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IN THE

Supreme Court of the United States

THE CITY OF NEWARK, THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Appellants,

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Appellees.

October Term, 1924
No. 351

APPELLANTS' REPLY BRIEF.

I.

The brief of the appellee Central Railroad Company of New Jersey overstates the appellants' contentions, and is quite inaccurate in its statement (p. 8) that appellants

> "claim that Congress has no authority to authorize the construction of any bridge over *any navigable water, state or interstate*, without the consent or concurrence of the States in or between which the waters lie."

What the appellants do contend is the following (being the heading to Point II of our main brief, p. 27):

> "The concurrent consent of both State and Federal Governments is necessary before a bridge over navigable waters *wholly within one State* may be lawfully erected."

It would seem that this attempt to stretch our contentions to untenable breadth is but a step in the process of imparting to cases on interstate bridges a relevance which they would not otherwise possess. The appellee railroad's principal cases being cases of interstate bridges, it is natural that it should contend that our brief puts interstate and intrastate bridges on a parity. The fact remains that it does not.

II.

The attempt of the appellee railroad (brief, pp. 8-10) to establish the interstate character of Newark Bay and to overcome the effect (as an admission of the truth of the opposite contention) of its motion to dismiss, is futile.

The District Court in its opinion, states briefly and accurately that the "waters of Newark Bay at the bridge site are navigable and lie wholly in the State of New Jersey" (Rec., p. 88).*

Newark Bay does not extend to Staten Island or to the boundary line between New Jersey and New York, fixed by the agreement of these States in the middle of the waters between Staten Island and New Jersey. These waters always have been known as "Staten Island Sound", with the "Kill Van Kull" at the eastern end of the Sound and the "Arthur Kill" at the southern end. Newark Bay extends to the edge of these waters only, whereas the boundary between New Jersey and New York lies in the middle of them.

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*The only observations on this subject in the opinion of the Circuit Court of Appeals are these (Rec., p. 108): "The complainants contend that these Amendments require that the concurrent consent of both State and Federal Government be obtained before a bridge over navigable waters wholly within one State may be lawfully constructed. Disregarding at present the contention of the respondent that the waters in question are not wholly within the State of New Jersey, is the proposition sound?" The Court made no further allusion to respondent's last mentioned contention.

The maps annexed to the Bill of Complaint do not attempt to show the limits of Newark Bay, but those limits may be seen on the official maps.

Furthermore, the boundary agreement between New York and New Jersey, referred to by appellee, shows clearly that no part of the waters between Staten Island and New Jersey is included in the limits of Newark Bay. Article Fourth of the agreement (4 U. S. Stat., 708, 710) provides:

> "The state of New York shall have exclusive jurisdiction of and *over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island* in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over *the waters of the sound from the westernmost end of Shooter's Island to Woodbridge creek*, as to all vessels bound to any port in the said state of New York." (Italics ours.)

The agreement, while fixing the boundary line in the middle of the various waters between the States, gives to New York exclusive jurisdiction of the whole of these waters as far as the low water-mark on the New Jersey side, from the northern end of Manhattan Island to the point where Woodbridge Creek flows into Staten Island Sound. In describing these waters over which New York has jurisdiction, it refers to the waters between Staten Island and New Jersey "to the westernmost end of Shooter's Island" as "the Kill Van Kull" and to the waters "from the westernmost end of Shooter's Island to Woodbridge Creek" as "the sound". Together, the two bodies of water cover the entire distance and there is no room for Newark Bay to come between them. There is no mention whatever of Newark Bay, as there most

certainly would be if, as the appellee railroad contends, Newark Bay extended to Staten Island.

In *People* v. *Central R. R. Co. of New Jersey*, 42 N. Y., 283 (1870), cited at page 9 of the brief of the appellee railroad, the opinion states (p. 291):

> "From a message of the governor of this State to the legislature, dated March 11, 1831 (*vide* Senate Documents of 1831, No. 55), and accompanying papers, it appeared that the State of New Jersey, in June, 1829, had commenced a suit in the Supreme Court of the United States against this State, claiming that 'the said State of New Jersey was justly entitled to the exclusive jurisdiction and property of and over the waters of Hudson river, from the forty-first degree of north latitude, to the Bay of New York to the *filum aquae* or midway of the said river, and to the midway or channel of said Bay of New York, *and the whole of Staten Island sound*, together with the land covered by the water of the said river, bay and sound in the like extent.'" (Italics ours.)

It is obvious that the State of New Jersey, in making this broad claim, considered "Staten Island sound" as being the entire body of water from the northern end of what is known as the Kill Van Kull to the southern end of what is known as Arthur Kill. Newark Bay would surely have been mentioned in the enumeration, if anyone had had any idea that it extended to the Staten Island shore. The State of New Jersey in that event would have also claimed jurisdiction to "the whole of Newark Bay". It would not have claimed jurisdiction over "the whole of Staten Island sound" and failed to claim jurisdiction over that part of Newark Bay which extended to the Staten Island shore.

It follows therefore that the appellee railroad's view of the matter is not based on notorious facts within the judicial notice of this Court. On the contrary, it is opposed to specific adjudications heretofore made. Even if the point were disputable, this Court should, under the doctrine of the *Chicago Junction Case*, 264 U. S., 258, 262-263 (1924), accord the motion to dismiss the effect of an

admission of the truth of the contention made by the appellant City of Newark in its complaint.

We question the propriety of the quotation in the appellee railroad's brief (pp. 54-55) from the Answer of its co-defendant, the Port of New York Authority, in attempted disproof of an allegation in the Bill of Complaint. Since a motion to dismiss a bill admits the truth of its allegations of fact, it is manifestly improper for a defendant moving to dismiss to attempt to controvert the same allegations by borrowing denials set up in the Answer of a co-defendant. "A demurrer is addressed to matters apparent on the face of the pleadings. In aid of it the Court cannot look to facts appearing in other parts of the record." *Brooks* v. *Metropolitan Life Ins. Co.*, 70 N. J. Law, 36, 39 (1903).

III.

The statement from the opinion of the Circuit Court for the District of New Jersey in *Stockton* v. *Baltimore & New York R. Co.*, 32 Fed., 9 (1887), appellee railroad's brief, page 29, that

> "It is commerce and not navigation, which is the great object of constitutional care"

is not in harmony with later decisions of this Court. See the decisions of this Court cited in our main brief, pp. 38, 44 and 70-74. Our respect for Mr. Justice BRADLEY's memory is great; but it is hardly proper to accord decisions by him sitting alone at Circuit a force equal to that of this Court sitting *en banc*. The quoted words are equally out of harmony with the theory of the Bridge Act of 1906, which, as pointed out at page 44 of our main brief, is essentially a navigation measure.

The supremacy of navigation at points of conflict with land-borne commerce is a necessary consequence of the fact that the natural highways of rivers are immovable and cannot be shifted, whereas there is always room for latitude in the location of tracks and bridges.

IV.

To the argument (appellee railroad's brief, pp. 46, *et seq.*), that the New Jersey Act of 1860 (printed as an appendix to our main brief, pp. 95-96) was a plenary grant of authority ample enough to embrace the proposed, as well as the existing bridge, it seems a sufficient answer that the appellee railroad acted for many years on the assumption not only that a new manifestation of State assent was necessary but that the Board of Commerce and Navigation was the proper agency to which to apply for such assent (Rec., pp. 15-16). Furthermore, the appellee railroad by applying for a special Act of Congress under the Bridge Act of 1906, has admitted that the replacement of the existing bridge by a new one is a separate and distinct enterprise and not a continuation of an old one begun in 1860. And its conduct was consistent with the prevailing congressional view. Thus on February 1, 1924, Congress passed an act (43 Stat., 4) authorizing certain El Paso, Texas, street railroads to construct a bridge over the Rio Grande "to replace the wooden bridge now in use at or near the aforesaid location, operated by said corporations under the authority of an Act of Congress passed and approved July 28, 1882" (22 Stat., 179).

If authority be required for the support of the foregoing we have it in the cases of *Morris & Essex R. Co.* v. *Central R. R. Co. of New Jersey*, 31 N. J. Law, 205 (1865), and *McCran* v. *Erie Railroad Co.*, 95 N. J. Eq., —, 124 Atl., 50 (Ct. Errors and Appeals, 1924).

In the former case, the Central Railroad Co. of New Jersey (the appellee in the case at bar), intending to cross the tracks of the Morris & Essex Railroad Co. with a new branch, had commissioners designated to assess damages. An award having been made, the Morris & Essex Railroad Co. sued out a writ of certiorari and

argued that the Central Railroad lacked corporate authority to build the proposed branch. The charter authorized the construction of certain lines of railroad; these had been built under the charter, but the Central Railroad claimed the right to alter the original plans and construct a new line to meet certain "exigencies produced by the developments of its business" (p. 208). But the Court denied the existence of the power and said (pp. 208-209):

> "The language of the act, in all its parts, is plain and intelligible. It authorizes the making of a road or roads and one branch road, and the acquisition and construction of certain convenient adjuncts. This is the entire scope. The company may do, at their option, one or more things; they do the act or acts and thus signify their election; and that is final. Any other conclusion would leave the scheme authorized by the legislature forever unsettled and undetermined. Every private right in the vicinity of the road would be subordinated to it. There is not a word in the act which seems to intimate the transmission of the right to alter the road, when once laid, or to add to or extend it; and it is scarcely necessary to say that such a prerogative cannot be the creature of intendment. The claim of a power so much in derogation of common right and public interests, could only be sustained by the most manifest intention on the part of the legislature to confer it. But there is nothing in the language of this act which, fairly dealt with, tends in that direction."

The Court went on to say (p. 209):

> " * * * it has been held, repeatedly, that the powers given to a corporation to take lands, when once exercised are exhausted. Thus the right of a railroad company, after their road was actually located, to make a relocation or to abandon the route adopted by them for a more eligible one, was entirely repudiated in the case of *Moorhead* v. *The*

Little Miami R. Co., 17 Ohio, 340 [1848]. And the same principle was applied in the case of *Blakemore* v. *The Glamorganshire Canal*, 1 Mylne & Keen, 154 [1832]."

In the *McCran* case, the Attorney General of the State of New Jersey sought to enjoin the Erie Railroad from appropriating without payment lands under water belonging to the State. The Court of Chancery (LEWIS, V.-C.) advised a decree for defendant on the ground that inasmuch as the original bridge and its connecting tracks were to be abandoned, the land under water occupied by it would revert to the State and would be a fair equivalent of the land to be taken for the proposed bridge (93 N. J. Eq., 286, 290). However, to protect all parties and to permit the bridge to be built pending an appeal, the Railroad was ordered to pay an appropriate sum into Court. This sum the Court of Errors and Appeals, reversing the Vice-Chancellor, ordered paid to the Board of Commerce and Navigation of the State of New Jersey,* or other proper state authority. The Court said (124 Atl. at p. 51):

*Section 16 of the Railroad Law (3 N. J. Comp. Stat. 4228) reads as follows:

> "16. *Bridges; viaducts; tunnels; taking land under water belonging to state.*—Any railroad company may build and maintain over such streams as the road may cross, such piers and bridges as they may deem expedient, and may build viaducts over or tunnels under any navigable or other river, stream or bay of water which such railroad may cross; putting in such viaduct a pivot-draw with two openings, each of no less width than the widest opening of any viaduct or bridge now built over any such river, stream or bay of water, at right angles to the main channel, located at a point convenient for navigation; provided, that such company shall not take any land under water belonging to this state until the consent of the riparian commissioners shall first be had and obtained (unless the said land is at least twenty-five feet under the bed of the water), who are hereby authorized to convey the same on receiving such compensation as they may fix. [P. L. 1903, p. 655.]"

By Sec. 5 of N. J. Laws 1915, c. 242 (printed in the Appendix to our main brief, p. 106) it was provided that the Board of Commerce and Navigation should "succeed to and exercise all the powers and perform all the duties now exercised and performed by or conferred and charged upon the Board of Riparian Commissioners * * *."

> "It is argued that the power given by the charter to build bridges (in the plural) over the Passaic and Hackensack rivers is general in its terms and in effect enables the company to build an indefinite number of bridges over each river as desired from time to time. Applying the principle that legislative grants are construed strictly, we hardly think this proposition requires extended comment."*

Even if we ignore the statutes set forth in the footnote, *ante*, page 8, and admit for the sake of argument that the Board of Commerce and Navigation of the State of New Jersey was without jurisdiction to entertain the three successive and unsuccessful applications addressed to it by the appellee railroad (Rec., pp. 15-16), the consequence therefrom is not that the State of New Jersey has waived its right to require that its consent to the new bridge be secured. The true consequence would be that the right to give or withhold consent remained in the Legislature and was never delegated to any board or commission.

See in this connection *People* v. *Delaware & Hudson Co.*, 213 N. Y., 194, 202 (1914), where the Court said:

> "As the general control of navigable waters is vested in the state, consent to bridge Island Creek should come from the legislature * * * unless the state through the legislature has delegated its power to give such authority. It has not, so far as has come to our notice, delegated such authority to the courts."

There is nothing in the organic law of New Jersey to prevent the principle of the foregoing case from being applicable there as well as in New York.

---

*See to the same effect the cases in the footnote on page 11 of our main brief.

V.

The brief of the appellee railroad ignores all the decisions on our main brief (pp. 48, *et seq.*) handed down after March 23, 1906, with the exception of the two cases which came up from New York, viz., the *International Bridge* case and the *Hudson River Connecting* case.

It is submitted these cases, which are ten in number, cannot be ignored or distinguished and that they must control the decision in the case at bar. Certain it is that they are not outweighed by the two earlier Circuit Court cases (the *Decker* and *Stockton* cases,* which related to *interstate* bridges) on which the appellee railroad so confidently relies.

Our theory of the statute is expounded at page 43 of our main brief, and need not be repeated here. The appellee railroad has made no attempt to refute it in any particular. We submit that the decisions of this Court cited in our original brief amply sustain the contentions based upon them.

*Reported, respectively, in 30 Fed., 723, and 32 Fed., 9.

Conclusion.

The final decree appealed from should be reversed with costs, and the cause remanded with directions to reinstate the complaint and proceed to a determination of the controversy upon the merits.

Dated, Newark, N. J., November 14, 1924.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 351.

THE CITY OF NEWARK, THE CITY OF JERSEY CITY, and THE STATE OF NEW JERSEY,
Appellants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Appellees.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

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Appellants,

vs.

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Appellees.

On Bill of Complaint.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

Statement of the Case.

The case is before the Court upon an appeal from a decree of the United States Circuit Court of Appeals for the Third Circuit affirming a decree of the District Court for the District of New

Jersey denying a preliminary injunction and dismissing the bill of complaint as against the defendant The Central Railroad Company of New Jersey for want of equity.

The City of Newark, a New Jersey municipal corporation, was the original complainant, and the State of New Jersey, and the City of Jersey City, another New Jersey municipal corporation, were admitted as complainant-intervenors. These three.complainants are the appellants. The Railroad Company and The Port of New York Authority are the only defendants.

The injunction sought was one to restrain the Railroad Company from building a draw-bridge across Newark Bay from Elizabeth to Bayonne to replace a draw-bridge constructed shortly after 1860 and ever since maintained by the Railroad Company under an Act of the Legislature of the State of New Jersey passed in that year.

Abstract of the Bill of Complaint and Intervening Petitions.

The bill of complaint alleges that the City of Newark is the owner of certain real estate and riparian rights appurtenant thereto located on the westerly shore of Newark Bay, a navigable tidal body of water lying wholly within the State of New Jersey; that the City is engaged in improving its said lands for transportation, shipping and other industrial purposes, and in establishing thereon a Port Terminal, in the carrying out of which work it has thus far expended $6,500,000; that this project contemplates that ocean-going steamers and sailing craft, engaged

in intrastate, interstate and foreign commerce shall have free access to such Terminal; that for a number of years the Railroad Company has maintained a bridge with draws across Newark Bay at a point between complainant's property and the junction of Newark Bay with Kill von Kull and Staten Island Sound; that such bridge was constructed and has been maintained pursuant to an Act of the Legislature of the State of New Jersey enacted in 1860, and is a serious obstruction to the navigation of Newark Bay by vessels seeking such Terminal (R., pp. 10, 11).

The bill further alleges that on August 8, 1919, Congress passed an Act granting the Railroad Company authority to construct, maintain and operate a new draw-bridge in place of the present bridge, such grant being made in accordance with the provisions of an Act of Congress entitled "An Act to regulate the construction of bridges over navigable waters" approved March 23, 1906 (34 U. S. Statutes, p. 84); that said last named Act required the construction of the bridge authorized by the Act of August 8, 1919, to be commenced within one year and completed within three years from its date; that the construction of the bridge was not commenced within the time so specified, and that therefore the authority granted to the Railroad Company ceased, expired and became null and void on August 8, 1920; that by a further Act approved February 15, 1921, Congress undertook to extend the time for the commencement and completion of the construction of such bridge for two and five years respectively from the date of the approval of such further Act of 1921, and that inasmuch as the original authority granted by Congress had then expired such Act of Febru-

ary 15, 1921, was inoperative and did not confer upon the Railroad Company any right to construct or maintain a bridge (R., pp. 12-13).

The bill further alleges that by the laws of the State of New Jersey all plans for the development of any water front upon any navigable water or stream of the State or bounding thereon, which involve the construction, change, alteration or modification of a bridge, must be approved by the State Board of Commerce and Navigation, and that any development or improvement made without such approval shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; that the Railroad Company has not secured the approval of its plan for such new bridge or a permit therefor from such State Board; that the States of New York and New Jersey have authorized the creation of a district to be known as the Port of New York District, which embraces among other things all of the waters of Newark Bay, and has also created a body known as "Port of New York Authority"; that such Port Authority has developed a comprehensive plan for the improvement of such Port District in which the existing bridge of the Railroad Company is not made a part, and that the consent of Congress has by public resolution been given to the execution of such plan "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution" (R., pp. 14-21); that neither the maintenance of

the present bridge nor the construction of the proposed new bridge is necessary to the proper maintenance and operation of the railroad of such defendant as it has branch lines extending from Elizabethport around the northerly and westerly shores of Newark Bay to Communipaw (part of Jersey City), which are adequate for its needs; that the City of Newark is informed and believes that the construction of the new bridge not only would be an unlawful purpresture but would seriously interfere with the development of its said Terminal; that the Secretary of War and the Chief of Engineers have approved the plans of the Railroad Company for such new bridge, but that such action was arbitrary, and is wholly void and without authority in law because of the matters and things so as aforesaid alleged, and because such action, and the Acts of Congress upon which it was based, were and are in violation of the rights guaranteed to the complainant by the Fifth Amendment to the Constitution of the United States, and constitute an attempted usurpation of the powers reserved in the Constitution to the States respectively, or to the people, and are therefore in violation of the Tenth Amendment to the Constitution (R., pp. 21-23).

The intervening petition of Jersey City alleges that it is the owner of lands on the Newark Bay and the Hackensack River located above the bridge (R., pp. 82-84). The intervening petition of the State of New Jersey merely alleges that the Railroad Company has not obtained the approval of the State Board of Commerce and Navigation to its plans for the construction of the proposed bridge and that without such approval

the bridge would by law constitute a purpresture and a public nuisance (R., pp. 74-78). The intervening complainants each accepted the allegations of the bill of the City of Newark.

The location of the present and proposed bridges as well as that of the Port Newark Terminal and the site of the proposed Jersey City Bay Terminal are shown on the map which faces page 48 of the Record.

Proceedings in the District Court and the Circuit Court of Appeals.

The Railroad Company moved in the District Court for the dismissal of the bill as against it for want of equity (R., p. 53).

After hearing counsel for all the parties and considering the case, the District Court rendered an opinion which will be found on pp. 86-99 of the Record, and in conformity therewith a decree was entered denying the complainants' motion for a preliminary injunction and dismissing the bill as against the Railroad Company for want of equity (R., pp. 99-100).

From this decree the complainants appealed to the Circuit Court of Appeals for the Third Circuit, which Court, on February 29, 1924, rendered its opinion affirming the decree in all its parts (R., p. 106).

Assignments of Error.

Appellants' assignments of error will be found on p. 112 of the Record.

The principal errors assigned and now relied on are two in number:

1. (No. 4)—That "The court erred in holding that the Congress of the United States had power under the Constitution to authorize the construction of the bridge described in the bill of complaint without the approval thereof by the State of New Jersey or by the State Board of Commerce and Navigation of the State of New Jersey, and/or by the Port of New York Authority."

2. (No. 5)—That "The court erred in so construing the Act of Congress, approved March 23, 1906, and known as the Bridge Act of 1906, as to make the authorization of said Act sufficient for the construction of a bridge over navigable waters wholly within one state, and to render the authorization thereof by such state unnecessary."

As we understand these assignments, No. 4 challenges the power of Congress to make the grant contained in the Acts of August 8, 1919, and February 15, 1921, assuming that such Acts constitute a grant and not a mere consent. No. 5 questions the construction assumed to have been put upon the Bridge Act of 1906 by the Circuit Court of Appeals as authorizing the construction of a bridge over navigable waters wholly within a State without previous or concurrent authorization by such State.

ARGUMENT.

I.

Congress had the power to authorize the construction of the bridge in question without the approval thereof by the State of New Jersey or any of its agencies.

We had supposed that the general power of Congress by independent action to authorize the construction of bridges over navigable waters, in furtherance of interstate commerce, was too well established to be open to question. Indeed, it was conceded by the appellants in the Court below. All that they claimed in that Court was that this power is limited to the authorization of bridges over interstate waters and does not extend to their authorization over navigable waters lying wholly within a State. As to bridges of the latter class they insisted that the source of power for their construction resides in the States and that Congress can go no further than to veto its exercise to the extent necessary to protect navigation.

Now, however, they go the whole length and claim that Congress has no authority to authorize the construction of any bridge over any navigable water, state or interstate, without the consent or the concurrence of the States in or between which the waters lie.

This change of front is probably due to the fact that it was demonstrated in the Court below that

Newark Bay does not lie wholly within the State of New Jersey but is bounded on one side by Staten Island in the State of New York. The bill of complaint alleges, it is true, that Newark Bay lies wholly within the State of New Jersey, but this is a mere conclusion of the pleader with respect to facts that are of common knowledge or established by public records of which the Court will take judicial notice.

Corpus Juris, Vol. 23, pp. 81-83;
Middlesex Transportation Co. v. *Pennsylvania R. R. Co.*, 82 N. J. Eq. 550.

The map and photograph annexed to the bill of complaint (R., pp. 48, 51) show that Newark Bay is bounded on the east by Staten Island, and the agreement between the States of New Jersey and New York and the approval thereof by Congress fix the boundary line between the States, at the point in question, in the middle of the waters between Staten Island and New Jersey (Laws of New Jersey 1834, p. 118; Laws of New York 1834, p. 8; 4 U. S. Stat., p. 708).

This agreement is set forth and recognized as fixing the boundary between the two States in *Central Railroad of New Jersey* v. *Mayor and Aldermen of Jersey City*, 70 N. J. L. 81; 72 N. J. L. 311; 209 U. S. 473. It is also recognized by the Court of Appeals of the Third Circuit as having such effect in *Leary* v. *Mayor and Aldermen of Jersey City*, 208 Fed. 854, and by the New York Court of Appeals in *People* v. *Central Railroad of New Jersey*, 42 N. Y. 283.

Appellants contended in the Court below that Newark Bay is bounded on the east in part by the Kill Van Kull and in part by Staten Island Sound. But these are merely local names given to indistinguishable and inseparable parts of the waters of Newark Bay in so far as they cross that Bay. The Kill Van Kull properly extends from Newark Bay to New York Bay, and Staten Island Sound from Newark Bay to Amboy Bay. It would, we submit, be as reasonable and intelligible to speak of one body of water as running through another as to speak of the Kill Van Kull or the Staten Island Sound as running through or across the foot of Newark Bay.

In support of their present claim appellants assert that as the title to all lands under navigable waters is in the States, and as, under our system of government, the States have sovereign power and jurisdiction over all such land and water, the right of Congress to impose obstructions over the same cannot be accorded without depriving the States of both their property and their sovereignty.

The power of Congress to regulate interstate commerce is conferred by the Constitution in broad and comprehensive terms. It extends not only to commercial transactions but to all the appliances and facilities of commerce both by land and water. With respect to all these it has been often said that the power of Congress is supreme and that no State can set up its sovereignty in opposition thereto.

But what becomes of this supremacy of Congress if any State can arrest its exercise at the border of every navigable river or waterway lying

either within or along its boundaries? In the present case the bill of complaint alleges that the City of Newark is establishing a port terminal on Newark Bay above the proposed bridge and that this project involves the construction of warehouses, piers, bulkheads, slips, basins, ferries, docks and other facilities of commerce, known collectively as the Port Newark Terminal. It alleges that in carrying out said project the City of Newark has expended up to the time of the filing of the bill the sum of about $6,500,000 and that the project contemplates that ocean going steamers and sailing craft engaged not only in intrastate but also in interstate and foreign commerce shall have free access to said terminal (R., p. 10).

This is stated as the moral, if not the legal, justification for the opposition of the City of Newark and the State of New Jersey to the reconstruction of the Central Railroad bridge which has now become unsafe and must soon be abandoned whether a new bridge is constructed or not. And the opposition is not to the particular bridge proposed but to any bridge (R., pp. 11, 21).

It is obvious that if the City of Newark, with or without the aid of the State of New Jersey, can at will stop transportation over the Central Railroad at Newark Bay, either because the waters of the Bay lie wholly within the State of New Jersey or because the State has plenary power over all waters lying within its territorial jurisdiction, it can also stop the traffic of the Pennsylvania Railroad, the Baltimore & Ohio Railroad, the Lehigh Valley Railroad and the Lackawanna Railroad at the Bay, or at the Passaic and Hackensack Rivers, and can thus cut off these railroads from

the Port of New York and compel them to use the Port Newark Terminal. And what Newark can do, Albany, St. Louis and other cities can also do. The result would be that interstate commerce would be at the mercy of every State having a navigable river or waterway lying across the pathway of such commerce.

Congress has never by any act or action acknowledged any such limitation upon its power to regulate interstate commerce, and the courts from the earliest times have defined this power in language so broad and comprehensive as necessarily to exclude the suggested limitation or any other limitation not expressed in the Constitution.

Thus, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, Chief Justice Marshall, referring to the power of Congress to regulate interstate commerce, said:

> "This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."

In *Smith* v. *Alabama*, 124 U. S. 465, 473, Mr. Justice Matthews said:

> "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

In *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 39, Mr. Justice Bradley said:

> "The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

In *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 350, Mr. Justice Hughes said:

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was

> to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control."

An instructive case and one that directly answers most of the objections raised by the appellants is *Stockton, Attorney General of New Jersey*, v. *Baltimore & N. Y. R. R. Co.*, 32 Fed. 9.

This suit was commenced by an information filed by the Attorney General of the State of New Jersey in its Court of Chancery for an injunction to restrain the erection of the railroad bridge now commonly known as the Baltimore & Ohio Bridge across the Arthur Kill or Staten Island Sound between New Jersey and Staten Island. The suit was removed to the Federal Court and was deemed of sufficient importance to warrant the calling in of Mr. Justice Bradley to preside at the hearing. It appeared by the information that an application had been made by the Railroad Company to Congress for an act authorizing the construction of such bridge. While the measure was pending in Congress the New Jersey legislature passed an act forbidding the erection of the proposed bridge without express permission given by the Legislature by statute in that behalf. Such action was preceded by the adoption of concurrent resolutions of the Senate and House of As-

sembly of New Jersey protesting against any action on the part of Congress intended to authorize the erection of such a bridge. Almost immediately after the passage of the State law, Congress passed an act similar in effect to the one which appellants challenge in the present case, and thereupon the State filed its Information. The learned Justice, in his opinion directing the dismissal of the Information, said (p. 16):

> "The power to regulate commerce among the several states is given by the constitution in the most general and absolute terms. The 'power to regulate' as applied to a government, has a most extensive application. With regard to commerce, it has been expressly held that it is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce. And it must extend to these, or it cannot embrace the whole subject. Under this power, the navigation of rivers and harbors has been opened and improved, and we have no doubt that canals and waterways may be opened to connect navigable bays, harbors and rivers with each other, or with the interior of the country. *Nor have we any doubt that, under the same power, the means of commercial communication by land as well as by water may be opened up by congress between different states, whenever it shall see fit to do so, either on failure of the states to provide such communication, or whenever, in the opinion of congress, increased facilities of communication ought to exist.*
>
> * * *
>
> *"Still, it is contended that, although congress may have power to construct roads and other means of communication between the states, yet this can only be done with the con-*

currence and consent of the states in which the structures are made. If this is so, then the power of regulation in congress is not supreme; it depends on the will of the states. We do not concur in this view. We think that the power of congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that, in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states." (Italics ours.)

Replying to the argument made in that case, as in this, based on the ownership of the State in the lands under water over which the bridge was to be constructed, Mr. Justice Bradley said (p. 17):

> "It is denied that the land of the state can be taken at all without voluntary cession, or consent of the state legislature. If this is so, we are brought back to the dilemma of requiring the consent of the state in almost every case of an interstate line of communication by railroad, for hardly a case can arise in which some property belonging to a state will not be crossed. It will always be so at the passage of a navigable stream. This shows that the position cannot be sound, for it brings us to a *reductio ad absurdum*. It interposes an effectual barrier to the execution of a constitutional power vested in congress. It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a state is necessary, such state may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution."

Replying to the argument based on the sovereignty of the State over the land and water to be crossed by the bridge, Mr. Justice Bradley said (p. 19):

> "The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it.
>
> * * *
>
> "And as one of these purposes is the regulation of commerce among the several states, and as that involves the needs and ways of intercommunication, it follows that congress may provide for these necessities whether the states co-operate and concur therein or not.
>
> * * *
>
> "The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain as part of the *jura regalia* of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the state, as they were by the king, *in trust,* for the public uses of navigation and fishery, and the erection thereon of wharves,

piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large.

* * *

"The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of congress, and congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient."

It was this case and the opinion of Mr. Justice Bradley therein to which Mr. Justice Gray re-

ferred in *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 532, where he said:

> "The reasons upon which the decision in that case rested were, in substance, the same as were stated by that eminent judge in two opinions afterwards delivered by him in behalf of this court, in which the power of Congress, by its own legislation, to confer original authority to erect bridges over navigable waters, whenever Congress considers it necessary to do so to meet the demands of interstate commerce by land, is so clearly demonstrated, as to render further discussion of the subject superfluous."

It should be noted that an appeal to this Court was taken in the Stockton case but that the same was dismissed. This dismissal was with costs, indicating that it was not by consent (140 U. S. 699).

About the time of the decision of the Circuit Court in the Stockton case a steamship owner engaged in navigating the waters of Staten Island Sound brought an action in the Circuit Court of the United States for the Southern District of New York to restrain the construction of the same bridge on the ground that it would interfere with navigation. The case is reported as *Decker* v. *Baltimore & N. Y. R. R. Co.* in 30 Fed. 723. Judge Wallace, in an opinion sustaining a demurrer to the bill of complaint and denying a motion for an injunction, said in part (p. 724):

> "*Whether the waters are wholly within the boundaries of a state, or, as here, lie between two states, is not material.* They are navigable waters of the United States, if they

form by themselves, or by uniting with others, a continuous highway for commerce with other states or countries. (Citing cases.)

"The power of control over such waters necessarily includes the power of deciding what structures are impediments to commerce; and, by an unbroken line of decisions, it is settled that the paramount authority regulating bridges that affect the navigation of the navigable waters of the United States is in congress.

"So long as this authority lies dormant, the states may authorize the erection of bridges over navigable waters within their limits, which may to some extent obstruct navigation, or, by concurrent action, may bridge the waters lying between them; but, so soon as congress intervenes and exercises its power of regulation, what has been done by state authority must give way to the paramount authority of congress. The power of the state ends where that of the nation begins.

* * *

"If the constitutional power of congress over the navigable waters of the United States is confined to a mere negation of state authority over them, if congress can only ratify and prohibit what the state proposes, if it has no faculty of independent action, and no vigor to originate, then, instead of being paramount, the power is practically subordinate to the power of the state. Yet it has never been doubted that, within the scope of its powers, the government of the United States is supreme, or that its authority, when asserted, is, to the extent asserted, of necessity exclusive.

"The constitution delegates to congress the power to prescribe the conditions upon

> which commerce in all its forms shall be conducted between the citizens of the several states, and to adopt measures to promote its development and prosperity. Bridges over navigable waters are necessary to facilitate transportation and commercial intercourse. They are well-recognized instrumentalities of commerce. The power to build them, or authorize them to be built, is an incident of the general power to regulate interstate commerce. If the national and state authorities disagree as to the expediency of bridging a river, and if, as is asserted, the power to act is partitioned between them, and can only be exercised concurrently, interstate commerce may be crippled. If congress deems a railroad bridge necessary or useful as an instrumentality of interstate commerce, there is no sound reason, aside from considerations of expediency, why it should not build one, or authorize a private corporation to do so." (Italics ours.)

In *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S., 1, there was involved the effectiveness of an act of the Legislature of Oregon purporting to authorize the construction of a bridge across the Willamette River, a navigable waterway lying wholly within the State of Oregon.

The opinion was by Mr. Justice Bradley, and upheld the Oregon act as a proper exercise of the police power of the State. The learned justice, however, was careful to base the decision upon the ground that Congress had not assumed jurisdiction over the rivers of Oregon.

He said (p. 12):

> "We do not doubt that Congress, if it saw fit, could thus assume the care of said

streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. *It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State.*" (Italics ours.)

Finally, we have the case of *People* v. *Hudson River Connecting Railroad Corporation,* decided by the New York Court of Appeals in 1920 and reported in 228 N. Y. 203. The case closely parallels the present one and is therefore of especial interest in this case. It was an action by the people of the State of New York against the defendant railroad corporation to restrain it from constructing a bridge with two spans across the Hudson River, at a point one hundred miles north of the boundary line between New York and New Jersey, where the waters of the Hudson River were entirely in the State of New York.

The defendant corporation was chartered under the laws of the State of New York in 1913, and on April 28th of that year the Legislature of New York granted it permission to construct a bridge across the Hudson River between Castleton and Schodack Landing, together with the necessary viaducts and approaches, and to maintain and operate the same, providing, however, that "the spans of the said bridge shall be not less than three hundred feet in length in the clear from pier to pier." (Chapter 388 of the Laws of 1913.)

On March 13th, 1914, Congress passed an Act substantially as follows:

> "* * * Authority * * * is hereby granted to the Hudson River Connecting Railroad Corporation * * * to construct, maintain and operate a bridge, together with the necessary approaches thereto, across the Hudson River, at a point suitable to the interests of navigation between Castleton and Schodack Landing, in accordance with the provisions of the Act * * * approved March twenty-third, nineteen hundred and six." (The General Bridge Act hereinafter discussed.)

On May 2, 1917, the Secretary of War approved the plans for the construction of a bridge with *two spans* across the river at the point in question.

On June 1, 1917, the Legislature repealed the Act of 1913 above referred to and authorized the defendant corporation to construct a bridge with but a single span and without piers or abutments between the dykes, instead of the bridge mentioned in the Act thereby repealed (Chapter 713 of the Laws of 1917).

On April 9, 1918, the Legislature amended the general railroad law by providing that no bridge across the Hudson River shall be built until the plans are approved by the State Engineer and Superintendent of Public Works.

These several acts are chronicled in the opinion of the Court of Appeals at p. 214.

Notwithstanding the 1917 and 1918 action of the Legislature, the defendant corporation proceeded to construct a bridge according to the plans approved by the Secretary of War as above, whereupon the Attorney-General filed an information in the Supreme Court to restrain such construction, alleging that it constituted a trespass upon lands belonging to the people of the State of New York, a purpresture, and a public nuisance.

The railroad corporation set up the grant of Congress above referred to as giving it plenary authority to construct the bridge notwithstanding the withdrawal of its consent by the State of New York. The Attorney-General demurred and, the demurrer being overruled, took the appeal decided in the reported case. This appeal was dismissed and the judgment of the Supreme Court unanimously affirmed.

Judge Elkus, speaking for the whole Court, said (p. 215):

> "When Congress exercises its authority and acts within its power, all other authority which conflicts or interferes with the Federal power must fall, for the sovereignty of Congress is plenary. (Citing cases.)
>
> "Congress is given authority over interstate commerce in article I, section 8, of the

Constitution: 'Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes.'

* * *

"It is a comprehensive clause, including within its intent the instruments and means by *which interstate commerce* is or may be carried on, even if those means or instruments are such as are inherently within a *single* state, such as the wharf of a transatlantic line, or the tracks over which pass trains *en route* from state to state, or the engine used to draw those trains, be it used for ever so short a haul within the state, and if this authority extends to the tracks and the engine, though used wholly within the state, surely it also includes bridges over which both of these pass, and this is particularly true if that bridge cross a navigable stream, the first great recognized instrument of interstate commerce. * * *

* * *

"The authority of the United States over the navigable waters is that of a supreme sovereign in so far as the authority is necessary under the interstate commerce provisions of the Constitution. As to all navigable waters, it has succeeded to the *jus publicum* as held by the King of England and holds such waters in trust for all the people of the United States under the Constitution. Its rights when exercised or to the extent exercised are paramount to the same *jus publicum* held by the state of New York for the people of the state."

It was therefore concluded that the grant of Congress was all sufficient authority for the construction of the bridge, and the same having been

made to a corporation then possessing State authority to construct a bridge, no after action of the Legislature could destroy the right thus conferred by the Federal grant.

Appellants claim that the portions of the opinion of Judge Elkus quoted above were mere *obiter dicta* and quite unnecessary to the decision of the case; that the only holding in the case was that the State had not effectively substituted its veto for its previously given consent.

Assuming, but not conceding, that the court might have placed its decision on this ground, it is obvious that it did not do so. On the contrary, it placed it squarely on the Federal grant and held that this overrode any and all objections of the State whenever and however made. Recognizing, however, that such a grant must be made to a corporation competent to receive the same, the Court pointed out that the railroad company had such competency when the grant was made, and held that the Legislature could not thereafter destroy the grant by repealing the Act which made it possible for the railroad company to receive and execute it. It was in this connection that the Court used the language quoted on p. 53 of appellants' brief. Appellants, however, have omitted the introductory part of the statement which explains what they quote. The whole paragraph reads as follows:

> "As already shown, this defendant *intra vires* of the charter obtained the grant of a franchise to build a bridge at Castleton from Congress. The right of Congress to make this grant and to authorize this bridge was plenary, and in the exercise of that right it

> made this grant to a corporation then competent to receive and exercise it. Can the legislature of New York state interfere with the plenary power of Congress to authorize this bridge for interstate commerce by depriving the corporation, authorized and vested with a grant of franchise from Congress, of the power *intra vires* to avail itself of the franchise by subsequently imposing the penalty of injunction and forfeiture of its charter for exercise of the franchise? The answer must be in the negative." (228 N. Y., at p. 224.)

In the foregoing case Judge Elkus pointed out the distinction between the case before him and the International Bridge Co. case of which so much is made in appellants' brief (228 N. Y., at p. 221.)*

This distinction was that while Congress had given plenary authority to construct the bridge in the instant case, in the International Co. case it had merely consented to the construction of a bridge in pursuance of the provisions of an Act of the Legislature of the State of New York—thus recognizing the latter as the primary source of authority. That this distinction was well taken, is shown by the excerpt from the opinion of this Court in the International case quoted in the opinion of the Court below as follows (R., p. 109):

> "When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw State control, but on the contrary an assumption that the control is to remain."

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* The International Bridge Co. case went to the Supreme Court from the New York Court of Appeals, and the decision of the Court of Appeals was affirmed substantially for the reasons given by that Court in its opinion.

It should be noted in passing that the grant of "original authority" to the Hudson River Company was in language identical with that contained in the grant to the Central Railroad of New Jersey in the Act of 1919.

The amazement expressed on p. 16 of appellants' brief at the method by which the Court below distinguished the International Bridge case from the present case, seems scarcely ingenuous. It is said that this distinction was that in the International case the United States had not exercised the power of eminent domain, implying, contrary to the fact, that in the present case it had done so. What the Court said was that in the International Bridge case the United States had not exercised the power of eminent domain; that the bridge was built in pursuance of the statutes of the State of New York; that Congress in that particular case had not chosen to exercise the power of exclusive control, but had left it to the State, so that the Court left the power of control just where Congress had left it.

It must be plain to anyone who can see at all that all the Court intended was to point out that in neither of the two ways by which Congress might have taken control of the situation had it chosen to do so.

Counsel cite a vast number of cases covering three pages of their index, mostly in support of the proposition (p. 27) (1) that "the concurrent consent of both State and Federal Governments is necessary before a bridge over navigable waters, wholly within one State may be lawfully erected"; or (2) of the proposition (p. 70) that "the power of Congress over navigable waters is

limited to their improvement for purposes of navigation, including the *removal* of obstructions." (The italics are the emphasis of counsel.)

We do not think it necessary to review these cases in extenso. None of them, we think, supports either of the propositions stated. Not one of them overrules or, so far as we can remember, even refers to the decisions hereinbefore cited as establishing the supremacy of Congress in the premises. There is of course no difference in the power of Congress to authorize a bridge over navigable waters dependent upon the interstate or intrastate character of such waters. The title of the States to the land under water within their domain, and their sovereignty over both the land and the water, is the same in either case.

That the power of Congress over navigable waters is not limited to navigation purposes, is evident from the fact that the power to regulate navigation is based on the power to regulate commerce as pointed out by Mr. Justice Bradley in the Stockton case (32 Fed., at p. 20). See also the opinion of the same learned Justice in *California* v. *Pacific R. R. Co.* (*supra,* p. 13).

The power of Congress under the commerce clause is no more limited to the "removal of obstructions" from navigable waters, than to any other subject committed to it by that comprehensive clause. As Mr. Justice Bradley said:

> "It is commerce, and not navigation, which is the great object of constitutional care." (32 Fed., p. 20.)

To concede either of appellants' propositions as above would be to involve the commerce of the

country in inextricable confusion and to give play once more to the State rivalries and State jealousies to get rid of which and their attendant evils the Constitution was adopted and the commerce clause inserted therein.

II.

The court did not err in construing the Bridge Act of 1906 and the Acts of August 8, 1919, and February 15, 1921, as together conferring upon the Railroad Company authority to construct the bridge in question without the consent of the State of New Jersey or any of its agencies.*

Appellants insist as above that a State, by virtue of its police power, and also of its inherent sovereignty, has the right to authorize the construction of bridges over intrastate waters, subject only to the power of Congress to prevent obstruction to navigation; that Congress has always recognized this right and has never, at least until 1906, attempted to supersede it or to prevent its exercise, and that the Bridge Act of 1906 ought to be construed, not as a reversal of this policy, but merely as a requirement, in the interest of navigation, that the consent of Congress shall be obtained before the State's franchise is exercised.

There can be no doubt that the States had the right, before Congress legislated on the subject,

* Appellants assert in their assignments of error that the Court of Appeals construed the Act of 1906 as alone giving authority. This is an error.

to authorize the construction of bridges over the navigable waters of the United States. Nor was this right confined to the authorization of bridges over intrastate waters. It was as fully recognized and as freely exercised with respect to interstate bridges as to those over waterways wholly within a State. And it is probable, as suggested by Mr. Justice Bradley in the Willamette case (125 U. S. 1) that a majority of the bridges over navigable waters in the United States were built under the authority of the States. Numerous instances, however, are given by him in the Willamette case (125 U. S. 13) and others in the Stockton case (32 Fed. 16) where the sole power emanated from Congress. Many other instances will also be found in the public laws since enacted.

The Arthur Kill bridge, which was the subject of dispute in the Stockton and Decker cases, was of course one of these. There Congress authorized the construction of the bridge not only without the consent of the States affected but against the solemn protest of the Legislature of the State of New Jersey (32 Fed. 12). And this was before Congress had passed any general legislation in restraint of the right of the States to authorize the construction of bridges over navigable waters.

The first general legislation passed by Congress restrictive of the right of States to authorize the construction of bridges over navigable waters is contained in the Rivers and Harbors Appropriation Act of 1890 (26 Stat. 426, 453). Sec. 7 of that Act contains the following provision:

> "It shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road,

> roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War."

There was a proviso to the effect that the Act should not be construed to authorize the construction of a bridge under an act of the legislature of any State over a "navigable water not wholly within the limits of such State."

The next important enactment on the subject is contained in the Rivers and Harbors Appropriation Act of 1899 (30 Stat. 1121, 1151). It is there provided as follows:

> "Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced."

This is the last important Act bearing on the subject prior to the Bridge Act of 1906. The first section of the 1906 Act provides that:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

The second section reads as follows:

"Sec. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair, with-

> out any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies."

Appellants call attention to the fact that this Act contains no repealer of existing legislation and insist that it ought not to be construed as repealing the right expressly accorded to the States by the Act of 1899 to authorize the construction of bridges across intrastate waterways without the consent of Congress, provided the location and plans are submitted to and approved by the Chief of Engineers and the Secretary of War.

They also cite cases holding that, in construing Federal statutes, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of the State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.

We agree with all this. And we concede that the Act of 1906 did not repeal the Act of 1899 in whole or part, and did not supersede or suspend the right of the States to authorize the construction of bridges over navigable waters to the extent that it existed before the passage of the Act.

As we read the Act of 1906, all that was accomplished, or was intended to be accomplished, by it was the establishment of certain conditions which should attach to all future grants by Congress of authority to construct bridges over navigable waters, without the necessity of repeating such

conditions in extenso in each grant. This appears from the debates in Congress referred to by appellants and is also apparent on the face of the Act.

The argument, however, that the 1906 Act is limited to grants for the construction of bridges over interstate waterways only, is, we submit, without any basis whatever.

1st—No such limitation is to be found anywhere in the Act.

2nd—The Act in terms covers grants to construct bridges across or over *any* of the navigable waters of the United States—a designation certainly broad enough to include both interstate and intrastate waterways; indeed as broad as the jurisdiction of Congress over the subject.

3rd—Although Congress may have expected that authority to construct bridges over intrastate waterways would generally be obtained under the Act of 1899, there is nothing in the history of its legislation or elsewhere to indicate an intention to abdicate its function in that respect, or to withhold its hand whenever, on account of State interests, State jealousies, State prejudices or on any other account, it might seem desirable to put it forth.

4th—No argument, we submit, in favor of appellants' claim in this behalf can be drawn from the reports and debates in Congress, when the Bridge Act was under consideration. These are referred to by appellants as demonstrating the correctness of its position and a copy of the same is annexed to their brief at pp. 89-95. This refer-

ence seems hardly permissible, as there does not appear to be any ambiguity in the Act to explain.

However, the report of the committee having charge of the bill shows that it intended just what the Act provides. The report says (App. Br., p. 89):

> "The purpose of the bill is to establish uniform regulations in regard to the construction and operation of bridges over navigable waters when hereafter authorized by Congress."

The report goes on to say (App. Br., p. 91):

> "In order to establish uniformity in reference to the construction of bridges and also to economize the time of Congress and reduce the length of bills and statutes, your committee respectfully recommends the passage of the bill, which has been approved by the Secretary of War and the Chief of Engineers, with the amendments suggested by them."

Where, in this language, is to be found a limitation to bridges over *interstate* navigable waters? In view of the fact that Congress possessed the same power to authorize the construction of bridges over intrastate as over interstate waters, and had exercised that power whenever occasion seemed to require it, and of the further fact that the regulations proposed would apply as much to the authorization of the one class of bridges as to the other, how in reason can it be supposed that these regulations were intended to apply to one class only? Why establish uniformity and economize the time of Congress in the one and not in the other?

But the brief quotes and relies upon the remarks of Mr. Mann, who had charge of the bill, to the effect that the power to construct bridges over navigable waters, lying wholly within the limits of a State, must be derived from the State itself; that the Government does not interfere with the right to do this; in other words, that the power of the Government is not exercised to regulate interstate commerce, but to prevent the interference with navigation and navigable streams; that the Government merely waives its right in behalf of persons who must obtain their authority elsewhere.

It will, however, be noted that these remarks were not made in explanation of the bill presented by the committee, nor were they a declaration as to its effect if enacted into law. They were merely made in answer to a question by Mr. Garret as to the existing state of the law with respect to streams wholly within the limits of a State. Mr. Mann, of course, was not speaking for the committee when he made the remarks, nor could he have intended to say that the Government had permanently waived its right in the premises. What he said was a correct exposition of the Act of 1899 and nothing more.

5th—Congress has construed the Act of 1906 as applying to the construction of bridges over intrastate waterways by its grant to the Hudson River Connecting Railroad Co., already discussed, and also by its grant to the Central Railroad Company in the present case; unless, indeed, it regarded the waterways affected by these grants as interstate because the navigable portions thereof do not lie wholly within the limits of a single State.

Further, by reference to Chapters 2455 and 2456 of the Public Laws passed by the 59th Congress (Vol. 34, Part 1, p. 191) it will be found that the first two grants made by Congress in pursuance of the General Bridge Act authorized the South and Western Railway Company to construct bridges with single or double tracks and approaches thereto over and across the Clinch River and the branches thereof, in the State of Virginia, and over and across the Holston River and the branches thereof, in the States of Virginia and Tennessee. Both of these grants were approved May 12, 1906.

Two days later an Act was approved granting to the Minnesota, Dakota & Pacific Railway Company authority to construct, maintain and operate a railway bridge and approaches across the Missouri River in the State of South Dakota, in accordance with the provisions of the General Bridge Act (Same Vol., p. 193).

On May 16th an Act was passed authorizing the Kansas City, St. Joseph & Excelsior Springs Railway Company to construct a railroad, wagon and foot bridge across the Missouri River in Clay County, in the State of Missouri, in accordance with the provisions of the Bridge Act (Same Vol., p. 196).

On June 21st an Act was approved authorizing the Chattanooga Northern Railway Company to construct, maintain and operate a bridge across the Tennessee River at Chattanooga, in the State of Tennessee, in accordance with the provisions of the Bridge Act (Same Vol., p. 388).

On June 25th an Act was approved authorizing the Chicago, Milwaukee & St. Paul Railway Company of Montana to construct, maintain and operate a railroad bridge and approaches thereto across the Missouri River at some convenient and practicable point within the limits of Broadwater County, or between Broadwater and Gallatin Counties, in the State of Montana, in accordance with the provisions of the Bridge Act (Same Vol., p. 456).

Numerous other Acts of the same character were passed by the same Congress, and hundreds of them have been passed by subsequent Congresses.

Unless, therefore, every navigable river is to be regarded as an interstate waterway along its whole navigable length, in case it anywhere, for ever so short a distance, passes between two States, it would seem that Congress has applied the 1906 Act as well to intrastate waterways as to those lying between two or more States.

But if this is not the case, and the term interstate waterways is to be regarded as broad enough to include all portions of a river where some portion of it flows between two States, then it must follow that Newark Bay is an interstate waterway since a portion of its navigable waters flows between New Jersey and New York (*supra*, pp. 8-10). We then have a case where the 1906 Act admittedly applies.

Nor is there any force in the argument that in the Act of 1906 Congress used the words "authorized" and "authority" in the sense of "consent."

These words are used throughout the Act in apparent contradistinction to the word "consent"

as used in the Act of 1899, and full and final effect is given to compliance with the conditions annexed to the Federal grant, which of itself is inconsistent with the idea that further authority is to be obtained elsewhere which might of course annex other and perhaps inconsistent conditions.

But the authority of the Central Railroad Company to construct the bridge in question does not come from the Act of 1906, but from the Acts of 1919 and 1921, and the Act of 1906 is of account only as throwing light upon the meaning of the latter Acts and as supplying the conditions referred to therein.

It is obvious, of course, that Congress might have made the present grant without any reference to the Act of 1906, whatever the meaning or purpose of that Act may have been. And it is equally obvious that if the Congress which passed the Act of 1906 had intended that it should be used only in connection with grants for interstate bridges, the Congress of 1919 had a right to use it in connection with a grant for an intrastate bridge.

The important question, therefore, is as to the meaning of the Acts of 1919 and 1921. These Acts are not set out in the record, the complainants contenting themselves with a reference to the same in their bill of complaint together with a statement that the first *granted* to the Railroad *authority* to construct the bridge and the second extended the time for the commencement of the same, both in violation of the Fifth and Tenth Amendments to the Constitution of the United States (R., pp. 12, 13, 23).

The Act of 1919 was approved August 8th, 1919, and reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That authority be, and is hereby, granted to the Central Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, its successors and assigns, to construct, maintain, and operate a bridge, and approaches thereto, across the Newark Bay, in the State of New Jersey, at a point suitable to the interests of navigation between the City of Elizabeth, in the county of Union, and the City of Bayonne, in the county of Hudson, in said State, in accordance with the provisions of the Act entitled 'An Act to regulate the construction of bridges over navigable waters,' approved March 23, 1906."

The Act of 1921 was approved February 15th, 1921, and reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the times for commencing and completing the construction of a bridge authorized by Act of Congress approved August 8, 1919, to be built by the Central Railroad Company of New Jersey across the Newark Bay between the city of Elizabeth and the city of Bayonne, New Jersey, are hereby extended two and five years, respectively, from the date of approval of this Act."

1. These acts are clear upon their face and there is no suggestion of a mere consent to be found in either of them. The first enacts *"that authority be, and the same is hereby granted"*

to the Railroad Company to construct, maintain and operate a bridge, and the second declares that the first *authorized* the construction of a bridge and merely modifies one of the conditions upon which the grant was made.

2. The language of the grant is identical with that in the Hudson River Bridge Company case, and the Court of Appeals of New York unanimously construed the grant in that case as conferring plenary authority. An application to this Court for a certiorari to review this decision was denied (254 U. S. 631).

3. Appellants' argument in this behalf, like so many other of their arguments, seems to be answered by the opinion of Mr. Justice Bradley in the Stockton case. There the Act provided:

> "That it shall be lawful for the Staten Island Rapid Transit Company, a corporation existing," etc., "to build and maintain a bridge across the Staten Island sound, or Arthur kill, from New Jersey to Richmond county, New York, for the passage of railroad trains," etc.

Justice Bradley said (32 Fed., p. 12):

> "The first question to be examined is the true construction of the act of congress on which the case arises,—the informant contending that it is merely permissory in its character; and the defendants, that it gives authority and power to build a bridge, without reference to any authority from the state. This question need not detain us long. The words of the act are broad enough to confer the authority, if congress had power to confer it. The language is: 'It shall be lawful for the Staten Island Rapid Transit Railroad

> Company,' etc., 'to build and maintain a bridge across the Staten Island sound, or Arthur kill.' This is the ordinary language used for conferring authority. Had the state legislature passed a law in these terms, there could not be a doubt of its sufficiency to give authority. And there are expressions in the act which imply that plenary authority was intended to be given. The minute directions laid down as to the manner of construction and use of the bridge imply this. The third section declares 'that any bridge *constructed under this act, and* according to its limitations, shall be a lawful structure,' etc.; implying that the construction of the bridge, when built, would be under the act. If congress had no power to authorize the construction of the bridge, independent of state legislation, the act would, of course, be properly construed as permissory in its character, ancillary to, or confirmatory of, state legislation which might be adopted for the purpose of authorizing such a bridge. In other words, the act, within the scope of its terms, may have such effect given to it as comports with the power of the legislative body which enacted it; just as a deed of conveyance may operate as a grant, a bargain and sale, a release, or a confirmation, according to the interest of the grantor on the one hand, and of the grantee on the other. The true construction of the act, therefore, depends on the power of congress, which will be examined hereafter."

4. As appears by the bill of complaint and the affidavits annexed, the Acts of 1919 and 1921 were passed in the face of known and violent opposition on behalf of the public authorities of the State of New Jersey and the City of Newark, and a bill for their repeal was introduced in Congress but failed of passage (R., pp. 11, 15, 47, 69). The

claim, therefore, that said Acts were intended as a mere consent to a grant by the State of New Jersey, which it was known would not be made, seems to lack even plausibility.

5. Words in a legislative act are to be construed in their natural sense and according to their generally accepted meaning (*Moore* v. *United States*, 249 U. S. 487, 489).

Webster's Dictionary defines the word "authorize" as follows:

> "To clothe with authority, warrant or legal power; to give a right to act; to empower; as to *authorize* commissioners to settle a boundary." *

It defines the word "consent" as follows:

> "To agree; to accord; to concur; to give assent or approval."

These are certainly the generally accepted meanings of the respective terms. In view of this, and seeing that Congress could either *authorize* or *consent* according to its will, how can it be said that in using one word it intended the other? If it had said "consent," would anyone argue that it meant "authorize"?

A reference to the statutes will show that Congress had given *consent* to the building of bridges in some cases and *authority* in others for a long time before the Bridge Act of 1906 was passed, and that it has continued this practice down to the present time. Thus, the 66th Congress, between May, 1919 and March, 1921 (covering the period

* The above definition of the word "authorize" is quoted and approved by this Court in *Blair* v. *Chicago*, 201 U. S. at p. 457.

of the grant to the Central Railroad Company of New Jersey) passed 49 Acts granting authority to construct and maintain bridges over navigable waters, and 29 which merely gave consent to such construction; and in the first session of the present Congress it granted authority for such construction in 23 cases and consent in 50 others. Surely it cannot be supposed that Congress indiscriminately used words so different in their ordinary meaning and acceptation.

III.

The allegations in the Bill of Complaint as to the obstructive character of the bridge, and as to the feasibility of building a tunnel, or re-routing the railroad traffic, are wholly irrelevant.

The determination of these questions is administrative in character and was committed by Congress to the War Department. The parties were fully heard before this Department and no appeal lies from its decisions to the Courts.

Pennsylvania v. *Wheeling Bridge Co.*, 18 How. 421, 430;
Miller v. *The Mayor of the City of New York*, 13 Blatch. 469;
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 635.

As was said by Mr. Justice Hughes in the last named case: "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction to navigation."

IV.

But if the Railroad Company needs the authorization of the State of New Jersey to the construction of the bridge it has it.

The District Court affirmed this point (R., p. 92) but appellants' brief says that the Court of Appeals rejected it (App. Br., p. 10). The Court of Appeals did nothing of the kind. It approved the first two of the points upon which the District Court rested its decision and stopped there, as of course there was no occasion for it to go further.

Appellants further say that "the allegations in the bill (R., p. 16) that the proposed bridge has not received the State's consent are allegations of fact which are admitted by the motion to dismiss" (App. Br., p. 11).

But the bill also alleges that the present bridge was constructed and has been maintained pursuant to an Act of the Legislature of the State of New Jersey approved February 23, 1860, entitled "A further Supplement to an Act Entitled 'An Act to Incorporate the Somerville and Easton Railroad Company,' passed February 26, 1847" (R., p. 11). (Copy of this Supplement is annexed to Appellants' Brief, at p. 95.)

It also alleges that the new bridge is to be upon substantially the same location as the existing bridge and is to replace the same (R., p. 11).

In view of these allegations it surely is open to the Railroad Company to insist that it has authority from the State under the Act of 1860 not only to construct but also to maintain a bridge

at the point in question and that no new consent is necessary to the construction of the bridge in substantially the same location as the old one. Such rebuilding does not amount to a new taking of the State's land under water or in any way invade the State's sovereignty, since the charter of the Railroad Company is perpetual and the grant to it of a right to build and maintain a bridge is of the same duration.

But counsel argue that the proposed new bridge does not conform to the Act of 1860 in that it is designed with a vertical instead of a pivot draw and is to be set at a 66 degree angle to the main channel of the Bay instead of at right angles thereto, in consequence of which departure from the Act of 1860 the bridge cannot be justified thereunder.

To this there are several answers:

1. No objection of this kind was made in the bill of complaint or in the petition of the Attorney-General for leave to intervene. Neither does any such objection to the bridge appear to have been made to the Railroad Company, to the Board of Commerce and Navigation or to the War Department. We submit, therefore, that this claim comes too late.

2. There is no statement of fact to be found either in the bill of complaint or in the Attorney-General's petition of intervention upon which to base such an argument. The bill does allege that the present bridge crosses the channel of the Bay at an angle of approximately 66 degrees and that the Railroad Company has for years been seeking

authority to construct a substitute bridge upon substantially the same location as the existing bridge. It is silent, however, as to the angle at which the new bridge is to be placed under the direction of the War Department. Assuming, however, that the new bridge is to be set at the same angle as the old one, it does not follow, nor is it alleged, that it is not to be provided with openings having a width at right angles to the channel as great as the Act of 1860 requires. It will be observed that this Act does not require that the bridge shall be set at right angles to the channel but merely that there shall be two openings, each of seventy-five feet in width at right angles to the channel. Obviously, therefore, a bridge set at an angle of 66 degrees to the channel would still conform to the Act if its openings were sufficient to afford the statutory clearance parallel to the channel.

3. The requirements of the Act of 1860 in the respects now insisted upon could only have been inserted for the protection of navigation. But with respect to all matters affecting navigation the power of Congress is admittedly supreme. These requirements must therefore be considered as provisional and directory only, subject to supersession by Federal authority when and as occasion might require without impairment of the grant. It was therefore within the province of the Secretary of War, acting under the direction of Congress, to determine the angle at which the new bridge should be set and the character of the draws it should contain, and he having done this, the State can no more enjoin the Company from carrying out the plans so prescribed than

it could forfeit the Company's charter in *quo warranto* proceedings for having done so.

Alluding to this subject in their brief in the Court below, counsel for appellants said:

> "The State is simply withholding from the railroad permission to build any bridge, and the railroad is not being asked to comply with inconsistent requirements. If the Secretary of War assented to a bridge of a certain type, and the State said the bridge should be of another type showing less regard for the interests of navigation, or forbidding the adoption of the federal safeguards, there would be a case of conflicting requirements, and the State requirements, not being in aid of navigation, would fall."

As Judge Elkus said in the Hudson River Bridge Case (228 N. Y. at p. 225):

> "It lies not in the mouth of the legislature to defeat the power of Congress, properly exercised, by penalizing the defendant for exercising its franchise from Congress to accomplish a purpose over which Congress has plenary power."

Appellants further object that the consent of the Board of Commerce and Navigation to the construction of the new bridge has not been obtained, and that this is required by the laws of the State of New Jersey.

We submit there is no such requirement. The powers of this Board, whatever they are, were conferred by the Act of the Legislature creating the New Jersey Harbor Commission, approved April 8, 1914. This Act is set out in the bill of complaint and again in the Attorney-General's petition of intervention (R., pp. 14, 74).

The Board of Commerce and Navigation succeeded to the powers of the River and Harbor Commission under an Act of the Legislature approved April 8, 1915 (R., p. 75).

Referring to the Act of 1914 it will be observed that Section 4 provides that "*All plans for the development of any water front* upon any navigable water or stream of this State, or bounding thereon, * * * which involves the construction, change, alteration or modification of a * * * bridge * * * shall first be submitted to the said commission, and no such *development or improvement enumerated within the provisions of this section* * * * shall be commenced or executed without the approval of this commission first had and received" (Italics ours).

It will be noticed that it is not the plans for the bridge that are to be approved, but the plans for the development or improvement of the water front when such plans involve as an incident the construction, change, alteration or modification of a bridge. "How," as the District Court remarked, "can the replacement of a bridge along a railroad right of way possibly be regarded as a plan for the development of water frontage?" (R., p. 95). That the Act of 1914 was not intended to apply to such replacement is too obvious to need discussion.

Lastly appellants object that Congress, by creating and adopting as its instrumentality the Port of New York Authority, qualified the license granted to the Central Railroad Company of New Jersey by imposing, as an additional requirement, the approval of that body.

The bill of complaint alleges that in the year 1921, pursuant to authority granted by the States of New York and New Jersey, a compact or agreement was entered into between the States by which there was created a district to be known as the Port of New York District, which embraced among other things all the waters of Newark Bay; that there was furthermore created by said compact a body known as "The Port of New York Authority," consisting of commissioners chosen by the States of New York and New Jersey respectively, having the powers and jurisdiction enumerated in the compact, which compact was thereafter ratified by Congress by a Joint Resolution approved August 23, 1921 (R., p. 16).

It is further alleged that the compact provided that the Legislatures of the two States would adopt a plan for the comprehensive development of the Port of New York; that thereafter such a plan was adopted and approved by said Legislatures and was consented to by a joint resolution of Congress approved July 1, 1922, in and by which resolution Congress not only consented to the plan but authorized the Port of New York Authority to execute the same. This comprehensive plan it is alleged provided for the construction of certain tunnels and bridges to form part of the plan; that it also provided for the construction of certain belt lines, including a belt line known as "Middle Belt Line", to connect New Jersey and Staten Island and the railroads west of the port with Brooklyn, Queens, the Bronx and the railroads on the easterly side of the port (R., pp. 17, 18).

It is also alleged that the 13th Article of the compact provided that:

"The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other Federal, muncipal, State or local authority, administrative, judicial, or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article 10 for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port" (R., pp. 18-19).

And further that the 8th section of the comprehensive plan provided:

"The port of New York authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the Congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all Federal agencies, including the Interstate Commerce Commission, the War Department, and the United States Shipping Board, for suitable assistance in carrying out said Plan.

> * * * It shall render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan. All municipalities, within the district, are hereby authorized and empowered to co-operate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to co-operate. * * * The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, * * *" (R., pp. 19-20).

The bill further states that:

> "The Joint Resolution of Congress aforesaid, approved July 1, 1922, referred to and approved the *bridges, tunnels and belt lines forming the comprehensive plan* which were generally and in outline indicated on the maps filed by The Port of New York Authority in the offices of the Secretaries of the States of New York and New Jersey and were in said Joint Resolution described in outline" (R., p. 20).

Paragraph XII of the bill states that the existing bridge of the Railroad Company and the proposed new bridge to be constructed by it were not made a part of the comprehensive plan and are not shown thereon, but are in conflict therewith, obstructive thereof and inimical thereto (R., p. 20).

Paragraph XIII states that the engineers of the Port of New York Authority expressly excluded from the development of such plan any bridge at the point in question, because such a bridge would

constitute an obstacle to the proper development of the Port of New York (R., p. 21).

The Port of New York Authority was made a defendant and answered the bill. Paragraph IX of its answer reads as follows:

> "The Port of New York Authority has not authorized the construction of the said proposed new bridge of the said Central Railroad Company of New Jersey and has taken no action thereon except as hereinbefore stated. The engineers of the New York, New Jersey Port and Harbor Development Commission and of The Port of New York Authority, in studying the problem of the port and in submitting the Comprehensive Plan, did not make the bridge route a part of any belt line system for the reason, first, that there was so great a density of traffic then and now passing over said brdge, both passenger and freight, that, in the opinion of said engineers, it would be undesirable to utilize said bridge as part of a belt line over which additional traffic could be carried; and, secondly, since the question of removing the said bridge or rebuilding the same or substituting a tunnel therefor had been under consideration for many years and the matter had not yet been finally disposed of, the engineers were of opinion that the said bridge route should not be made a part of the belt line system. The Port of New York Authority on the 27th day of July, 1922, wrote the War Department the letter of which a copy is hereto annexed, marked Exhibit G. Except as in this paragraph expressly admitted, or as qualified, the defendant denies the allegations of Paragraph XIII" (R., p. 57).

It will thus be seen that the Port of New York Authority denied the allegation of the 13th para-

graph of the bill to the effect that its engineers expressly excluded from the development of the comprehensive plan any bridge at the point in question *because such a bridge would constitute an obstacle to the proper development of the Port of New York, and gave a totally different reason for such exclusion.*

To this answer was annexed a copy of a letter addressed to the Port of New York Authority by the Acting Secretary of War, bearing date August 26, 1922 (R., p. 69). In this letter the Acting Secretary asked the Port of New York Authority to "make recommendation to the Secretary of War whether the development of the harbor and business affected both by land and by water, will be better served by the construction of a new bridge or by the elimination of any bridge across this portion of the Bay."

When this letter was written the Secretary had before him the application of the Railroad Company for the approval of its plans for the construction of a bridge pursuant to the grant of Congress.

The Port Authority replied to the Secretary's letter on September 8, 1922, declining to make any recommendation on the subject and referring the Secretary to the Board of Commerce and Navigation of the State of New Jersey (R., p. 71).

It will be observed that the assertions of the bill to the effect that the proposed bridge is in conflict with the comprehensive plan, obstructive thereof and inimical thereto, is not supported by any fact set out in the bill or to be found elsewhere in the record, and is not endorsed by the Port of New York Authority. As a mere un-

supported assertion of the pleader it is not, we submit, admitted by the motion to dismiss.

The comprehensive plan is not annexed to the bill and was not put into the record. All we are told about it is that it provided for the construction of certain bridges and tunnels and railroad belt lines, "including a belt line known as 'Middle Belt Line,' to connect New Jersey and Staten Island and the railroads on the westerly side of the port with Brooklyn, Queens, the Bronx and the railroads on the easterly side of the Port" (R., p. 18).

It is not alleged that the Bay bridge will interfere with the construction of any of these works. Indeed to anyone acquainted with the geography of the section it must be apparent that the bridge is miles away from them and from the port of New York which they are designed to serve.

But the theory of the appellants seems to be that something, somewhere, in the comprehensive plan deprived the States of New York and New Jersey and the Congress of the United States of the power to authorize any bridge over the North River, the East River, Newark Bay, or any other of the waters of the port district, without the consent of the New York Port Authority; or at least required such consent before any grant by any of them should become effective.

When it is understood that this district, as pointed out in the opinion of the District Court, runs as far north as Irvington on the Hudson, N. Y.; as far east as Long Beach, Long Island; as far south as Atlantic Highlands, and as far west as Summit, N. J., it will be seen how extensive this claim is.

Surely if the plan contained anything of a sort so remarkable, it was incumbent upon the complainants to set it forth, and their failure to do so is potent evidence of its non-existence.

Appellants say in their brief (p. 83):

> "It is clear that the state of the law upon the adoption of the Joint Resolution of August 23, 1921, is that no bridge over navigable waters in the Port of New York District can lawfully be constructed unless the consent of the Port of New York Authority, or of the State where the bridge is to be built, is obtained."

We submit that this is not clear at all; that on the contrary nothing contained in the part of the Port plan as set forth in the bill of complaint even tends to support such an assertion. Appellants seem to concede that the State where the bridge is to be built may authorize such construction without the consent of the Port Authority. But if the States may do it, why may not Congress?

Congress annexed to its approval of the Port Plan the following (42 Stat., 822, 826):

> "*Provided,* That nothing herein contained shall be construed as impairing, or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

Surely, therefore, if the grant to the Railroad Company had been made *after* the approval of the Port Plan and without referring to it, the plan would not have affected the grant or been read into it.

But appellants argue that because the grant *preceded* the plan and the approval thereof by

Congress, the effect of such approval was to qualify the grant notwithstanding it is nowhere referred to therein. To such lengths are the appellants driven by the exigency of their case! To state the argument is to answer it. As well might it be claimed that the mere approval of the Port Plan by Congress imposed upon every grant it had ever made to construct and maintain a railroad or highway bridge over navigable waters within the Port District, the requirement that such bridge should not be built, or if built and thereafter destroyed by lightning, tempest, collision, the public enemy, or otherwise, should not be restored unless the Port Authority should consent thereto. This would be an abdication of the functions of Congress with a vengeance! For it must be remembered that the Port of New York Authority is a State agency composed of Commissioners appointed by the States who may be changed from time to time as the States elect, without Congress having any voice in the matter.

We respectfully submit that the decision of the Circuit Court of Appeals should be affirmed with costs.

Dated October 31, 1924.

CHARLES E. MILLER,
Solicitor for Defendant-Appellee,
The Central Railroad Company
of New Jersey.

CHARLES E. MILLER,
RICHARD V. LINDABURY,
of Counsel.

[redacted]

IN THE

Supreme Court of the United States

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IN THE

Supreme Court of the United States

THE CITY OF NEWARK, THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY, Appellants, against THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, Appellees.	October Term, 1924 No. 351

BRIEF ON BEHALF OF THE PORT OF NEW YORK AUTHORITY.

INTRODUCTORY STATEMENT.

Although The Port of New York Authority (hereafter referred to in this brief as the Port Authority) is nominally a defendant-appellee, the answer discloses clearly that, in effect, it appears as *amicus curiae,* praying (fol. 174) that the Court "determine its legal duties in the premises" and expressing "its readiness and willingness to pass upon any application for a permit to build such bridge [the bridge in question] if the Court shall determine that, under the acts of the Legislatures of the States

of New York and New Jersey and of the Congress of the United States, such permit is required."

It conceives it to be its official duty to aid the Court in an understanding of the history and purposes of the legislation under which it is proceeding and which in this litigation is brought before the Court for the first time. It appreciates the commendation of the District Court in referring to its attitude in this litigation in the following words (fols. 286-287):

> "* * * the Port Authority, apparently directed by men of vision, has proceeded, so far as endeavoring to secure power is concerned, with commendable caution. In the present situation the Port Authority has not asserted itself in any way. It is brought into court as a defendant and states that if it has any duties to perform in the premises it will gladly perform them."

For the guidance of the Court, counsel may say that, in his opinion, any jurisdiction which the Port Authority may have over the bridge in question or any duty with which it may be charged in relation thereto is to be found in one of two documents, either the compact between the two States defining generally the jurisdiction and powers of the Port Authority, or in the principles of the Comprehensive Plan which are set forth in Section 1 of the statutes of the two States and the Congressional resolution adopting the plan. The bridge is nowhere mentioned specifically. In determining whether any duty is placed upon or power is given to the Port Authority, it is clear that the directions of the compact and of the Comprehensive Plan being general in scope, light upon their specific application must be sought in the historical development of the compact and statutes and the studies submitted to the legislatures which preceded their adoption.

For these reasons this brief is neither a brief for an appellant nor for an appellee. It is intended to furnish, in convenient and summary form, the legislative history and the surrounding circumstances through which the Port Treaty and the Port Authority came into existence, further to aid the Court in understanding the nature and extent of the "Comprehensive Plan for the Development of the Port of New York" and the legislation imposing upon the Port Authority the Federal and State duty of effectuating the plan, and to determine whether the Port Authority is charged with any duty in the premises.

For the convenience of the Court, we have printed as an appendix to this brief the compact, the legislation authorizing it, the legislation approving the Comprehensive Plan, and such other legislation relating to the Port Authority as could in any way be pertinent.

Historical Relations Between New York and New Jersey.[1]

Prior to the New York Harbor Case in 1916, there had arisen other disputes between the States of New York and New Jersey, centering around the harbor of New York.

In the early history of the two States there was an almost continual dispute over title to the waters of the harbor.[2] Attempts to settle the dispute by arbitration

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[1] Fuller reference to this history will be found in the compendious report of the New York, New Jersey Port and Harbor Development Commission, dated December 16, 1920, chapter 1 of Part II, page 41 *et seq.*, Part III, compact between New York and New Jersey for the creation of a port authority and the comprehensive development of the port, page 435 *et seq.* A copy of the report will be found in the library of the Court.

[2] By virtue of the original grant, New York claimed title to high water mark on the New Jersey shore, while New Jersey contended that, by the Revolution, she had conquered sovereignty to the middle of the river. The history of the boundary dispute between the two States has been well told in two cases: *Central R. R. of N. J.* v. *Jersey City,*

were unsuccessful and litigation failed to terminate it.[3] In 1833, however, a treaty was negotiated and confirmed by Congress, which gave New York exclusive jurisdiction (as distinguished from sovereignty) over a portion of the waters and granted the same rights to New Jersey over the balance.[4]

The case of *Gibbons* v. *Ogden,* 9 Wheat. 1, also arose out of conditions in the Port of New York, as a result of the monopoly attempted to be conferred upon Livingston by the State of New York.

In 1908 the State of New York sued the State of New Jersey to restrain the construction of a sewer by a New Jersey commission, calculated to discharge sewage into the bay, to the injury of New York. In its decision, the United States Supreme Court made the suggestion that the solution could better be reached "by co-operative study and by conference and mutual concession" rather than by litigation (*New York* v. *New Jersey,* 256 U. S. 296; 65 L. Ed. 937, at p. 945).

The New York Harbor Case.[5]

It was the litigation and decision in the proceeding known as the New York Harbor case which was the occasion for and gave the impetus to the joint study from

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70 N. J. L. 81 (1903); *State* v. *Babcock,* 30 N. J. L. 29 (1862). Judge Elmer, who wrote the decision in the latter case, was in fact one of the Commissioners who negotiated the Treaty of 1833-34. Decisions in analogous cases were hostile to New Jersey's claim. *State* v. *Davis,* 1 Dutcher (N. J.) 386 (1856); *Handley's Lessee* v. *Anthony,* 5 Wheat. 374 (1820).

3 3 Pet. (U. S.) 461 (1830); 5 *id.* 283 (1831); 6 *id.* 323 (1832); see summary of bill in 108 U. S. 406-410 (1882).

4 Ch. 8, Laws of New York, 1834; Laws of New Jersey, 1833-34, p. 118. The treaty in full and the interpretations placed thereon will be found in chapter 1 of Part II, page 42 *et seq.,* of the Bi-State Commission Report, referred to in Note 1, page 3, *supra.*

5 47 I. C. C. 643.

which resulted the creation of the Port Authority and the adoption of the Comprehensive Plan. The circumstances of the case, the complaint made and the decision are of the greatest importance in the interpretation of the legislation under which the Port Authority acts.

In 1911 Governor Wilson of New Jersey appointed a commission of three members to study the problem of port development. A similar body from New York co-operated. Following the reports of the New Jersey Commission and its successors to the Legislature of that State, a committee joined with the New Jersey Board of Commerce and Navigation and with the cities of Newark, Hoboken, Jersey City and Elizabeth, instituted a proceeding before the Interstate Commerce Commission entitled "Committee on Ways and Means to prosecute the case of alleged railroad rate and service discrimination at the Port of New York, Board of Commerce and Navigation of the State of New Jersey, the City of Newark, City of Jersey City, the City of Hoboken, and the City of Elizabeth, all in the State of New Jersey, v. The Baltimore & Ohio Railroad Company, et al.," which is officially known as the New York Harbor Case, No. 8994.

This case aroused great opposition on the part of the State of New York, the City of New York and various civic and commercial bodies. The Chamber of Commerce of the State of New York in an intervening petition filed on the 19th day of October, 1916, alleged that the proceeding was

> "instituted for the purpose of shifting the basic center of the commerce of the Port of New York and thus artificially to stimulate the transfer of commercial and industrial advantages to the State of New Jersey, but to the great disadvantage of the city and state of New York."

The State of New York, intervening in the proceedings by the Attorney General, alleged that:

> "To break up the present Port of New York into two parts—one a Jersey and one a New York port—is to abandon the policy of co-operation and of friendliness that for over a century has existed between the two States, and to develop a rivalry disadvantageous to both."

The City of New York, intervening in the litigation, charged

> "that the complaint in this proceeding proposed a reorganization of the Port of New York as a whole in favor of the complainants, and to the damage of the petitioner, and which would give to the complainants certain advantages."

In the proceeding before the Interstate Commerce Commission much testimony was taken, many exhibits filed and the history of the relationship of the States of New York and New Jersey gone into with considerable detail. The complainants contended that the whole organization of the port was fundamentally wrong. In their complaint they alleged:

> "Under the unscientific and uneconomic methods practiced by the carriers, and before referred to, the business of the Port of New York has been developed along wholly artificial in lieu of natural lines. The result is that the City of New York has become so congested with traffic, and the price of land, owing to this artificially created demand, has risen so high, that the expense of conducting business on Manhattan Island has become excessive. High rents, high taxes, high insurance rates, congestion of the streets, congestion at the pier stations and shipping yards of the railroads, the wasteful methods in handling and rehandling all foodstuffs consumed, the value of which is estimated at more than

> $700,000,000 per annum, with the consequent heavy cost of drayage, estimated at $50,000,000 per annum, the loss to the railroads themselves in carrying goods across the Bay and back again, in some cases only for storage, are all a burdensome tax upon business conducted at this port, which can only be completely removed by the reorganization of the Port as a whole, and utilizing the advantages of the New Jersey shore and navigable waterways near its great Port."

The complainants (New Jersey) further contended that the condition

> "affects not only the Port of New York, but practically the entire industrial situation in the United States, as the excessive cost of doing business at the Port of New York under existing conditions, affects all of the industries of America whose products pass through or come to the Port for distribution. The problem therefore is really a national one, and is not confined solely to a local situation. It involves the handling of many times the maximum amount of tonnage that is estimated will go through the Panama Canal."

To solve the problem they urged specifically the creation of a new rate zone, either putting New Jersey substantially on the Philadelphia basis or at least establishing a lower rate to the western than to the eastern side of the harbor.

In opposition to the position of New Jersey, New York took the position that the metropolitan district was a natural rate zone; that historically, geographically and commercially it was one district and that the port "should not be split." One of the tables showed that the center of population of New Jersey had remained constantly within the northern counties of New Jersey. Other tables submitted by New York indicated a significant parallelism

in the growth of the northern counties of New Jersey with that of New York, thus showing the economic unity of the whole territory, "the Metropolitan District."

The Interstate Commerce Commission declined to disturb the existing rate situation, nevertheless stressing the dangers inherent in the existing situation, diagnosing them with acuteness and scientific precision.

> "The complainants' contention that the methods of handling both domestic and export traffic at the Port of New York *must be thoroughly revised if the maximum of efficiency is to be attained is abundantly established by the evidence of record.*
> * * *
>
> "*We cannot with propriety overlook the fact that the terminal problem at the port of New York is due in no small measure to competition between the railroads.* With convenient through routes available to the shipping public over the lines of all the carriers, and with the same rates of freight applying over all the routes, practically the only field of competition left to the railroads is that provided by their separate terminal operations. A shipper will employ the services of the carrier which offers him the most convenient facilities for the receipt and delivery of his shipments. It is this rivalry between the railroads in the matter of terminal service that has induced them to lay hold of almost every available foot of land on the New Jersey side of the harbor. It is this rivalry that prevents the establishment of reciprocal switching arrangements and joint terminal operation on the New Jersey shore, and for the difficulties encountered in endeavoring to persuade the railroads to construct freight tunnels under the river between New Jersey and Manhattan. *And it is this rivalry that tempts the carriers to invest large sums in new terminals for their individual use instead of uniting in a common effort to solve in a larger way a problem whose solution can never be attained as long as the present policy of unrestrained competi-*

> *tion is continued.* It is not too much to expect that the defendants will take immediate steps to reorganize and co-ordinate their terminal facilities at the port. There can be no justification, especially in a time of national emergency, for a policy that permits certain terminals to be congested with a surplus of freight while at the same time a nearby terminal has not enough traffic to keep it busy. *It is necessary that the great terminals at the port of New York be made practically one, and that the separate interests of the individual carriers, so long an insuperable obstacle to any constructive plan of terminal development, be subordinated to the public interest."*

The Commission directed attention to "the difficulty of attaining a physical co-ordination of facilities at the port, and administering them as an organic whole," and said that this was

> "attributable in part to the nature of the harbor and to the fact *that the opposite sides of the port lie in different states.* * * * the fact that the port is thus divided into two parts by a state line cannot be overlooked by those who would understand its history and the problem confronting those who are interested in its development."

The Creation of the New York, New Jersey Port and Harbor Development Commission.

The New York Harbor Case precipitated serious discussion of the problem of the organization of the port as a whole. Practically every trade and civic body within the Metropolitan District became interested. All the cities and organizations along the Hudson intervened in the proceeding. The New York press attacked New Jersey for attempting to "split the Port of New York." The New Jersey press attacked New York for its "selfishness and

narrow-mindedness." The educational influence upon all of the participants resulted in bringing about a conception of larger gains through the co-operation of the two States.

Thus it came about that the Governor of the State of New York[6] and the Governor of the State of New Jersey[7] recommended to the Legislatures of the two States respectively, in 1917, that the task of developing the Port of New York be undertaken as a "joint task" by the two States; more especially since[8] the Interstate Commerce Commission had held that "the Port of New York is historically, geographically, and commercially one port * * * any congestion in the port at any one point affects the whole port," and that "Haphazard, piecemeal attempts to solve the terminal problem at the port will hinder, not hasten, the desired solution."

Chapter 426 of the Laws of 1917 of the State of New York and Chapter 130 of the Laws of 1917 of the State of New Jersey established in each State "a commission to act jointly with a similar commission" of the other "in the investigation of Port conditions at the Port of New York and to submit a comprehensive report recommending the proper policy that shall be pursued for the best interests of the entire Port of New York, and the legislation, State and Federal, that will be necessary to make such recommendation effective." They directed each Governor to appoint three commissioners, who were to have power on the part of the State to meet commissioners appointed by similar action of the Legislature of the other State,

> "to negotiate or agree upon a joint report, recommending a policy to be pursued by the State of New York, the State of New Jersey and the United States by legislative enactment *or treaty* or other-

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[6] Hon. Charles S. Whitman.
[7] Hon. Walter E. Edge.
[8] Governor Whitman's message, Feb. 18, 1918.

wise, to the end that said Port shall be efficiently and constructively organized and furnished with modern methods of piers, rail and water and freight facilities and adequately protected in the event of war. Before making such report, such Commission shall make a thorough investigation of Port conditions in this country and shall take and employ such engineering, legal or other professional skill and assistance as it may need for the effective working out of a comprehensive and adequate interstate and Federal Port policy, to meet commercial needs in times of peace and the protection of the harbor and adjacent localities in times of war."

The Commission organized August 1, 1917, as a joint Commission. Early in 1918, in a Preliminary Joint Report, it expressed the belief that a period of two years and an expenditure of $400,000 would be required for its investigation. In round figures, it obtained and kept within the appropriation of $400,000, the States expending later, as we shall see, $100,000 for the further study of the plans of the Commission.

The Report of the New York, New Jersey Port and Harbor Development Commission.

The final report, embracing 495 pages and 12 maps and charts, consists of three parts and twelve appendices, Part II consisting of thirty-three chapters. It has since been referred to as the greatest engineering study ever made of port and harbor facilities.

The report began with the sentence: "A serious situation confronts the Port of New York," and it treats the problem not as one merely "for the concern of public officials, directors of railroads, steamship companies and other terminal enterprises," but as "a great sociological problem of chief concern to the public at large." In 1920

the Port and Harbor Development Commission found that the Port District included some eight million people. About eight per cent. of the population of the United States would, therefore, be directly and vitally affected in its daily life by any solution proposed. Just as vitally affected were the shippers and consignees of the traffic passing through the port, which in 1914 exceeded 76,000,000 tons.

The Bi-State Commission found that the port problem *"is primarily a railroad problem"* and that while "Navigable water, or water easily made navigable, reaches into nearly every part of the Port District * * * rail accessibility and co-ordination therewith are lacking at many points. *Therefore the comprehensive plan to evolve which this Commission was created is essentially a railroad plan."*

It thereupon recommended a completely *"remodelled terminal railroad system,* bringing every railroad of the Port to every part of the Port, and thus giving every part of the Port opportunity to develop and to have the economical transportation service needed for its commercial and industrial growth and expansion." This constituted the "Comprehensive Plan." It aimed "to provide for the development of the Port both for the immediate future and for many years to come."

The Report on Newark Bay and Its Bridges.

In the chapter dealing with Newark Bay (the special part of the port involved in this litigation) the Bi-State Commission said:[9]

> "Newark Bay is at present served by a channel which runs diagonally from a draw span near the east end of the bridge of the Central Railroad of

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[9] Pages 368, 369.

New Jersey to a more central position farther north. The bay is reached by a 20-ft. channel in the Kill van Kull, a sharp turn being required at the junction of the two channels. A project is now under way for deepening the channel to 30 ft. and widening it to 400 ft. for the entire length of the bay.

"This project when completed will hardly meet the needs of the bay and its tributary rivers. The city of Newark, through its Port Newark terminal development created some years ago, has made a substantial beginning to the opening up of the west side of Newark Bay for shipping. The city of Jersey City is planning a development along similar lines on the east side of the bay and the lower Hackensack River. Shipbuilding plants were established at the head of the bay during the war, and there is every reason to look for the location of other industries along the navigable waters of this section of the Port as soon as the railroad facilities provided in the comprehensive plan are available.

"Channels should be dredged by the Federal Government along the pierhead lines on both sides of the bay, and ultimately the entire bay should be dredged to the depth of the projected channel. The shoal off Bergen Point should be removed so that ships entering the bay from Kill van Kull can turn close to the point.

"The bridges across Newark Bay present a problem. In their present form they are a serious obstruction to navigation, yet they are important links in the railroad system of the Port, and cannot be ruthlessly destroyed.

"The Central Railroad of New Jersey is planning to rebuild in the near future its bridge across the south end of the bay, providing longer and higher fixed spans and wider openings at the lift spans. Before a positive decision is reached the Commission urges that full consideration be given to the replacement of the bridge by a tunnel, as has been advocated. If this is impracticable, the bridge should be rebuilt at once in accordance with a de-

sign providing for the minimum of interference with land and water traffic, as the present structure is a serious menace to navigation and deterrent to the proper development of the bay."

The Port Treaty or Compact between New York and New Jersey for the Development of the Port.

The Bi-State Commission had not proceeded very far in its study of the port problem without a realization that the legal phases of the problem required very careful study. Such a study was made and is to be found in the "Preliminary Report of Counsel to Accompany the Tentative Draft of Proposed Treaty Amendatory and Supplementary to the Treaty of 1834."[10]

The Bi-State Commission concluded that the structure of the Port Authority for the Port of New York should be built upon a compact or treaty supplementing the New York, New Jersey treaty of 1834.

The history of the evolution of this document is to be found in Part III of the Bi-State Commission's report, page 436 *et seq.* The legal aspects of the problem, as presented to the two States, will be found discussed at page 444 *et seq.* In the evolution of the port compact or treaty the Bi-State Commission was assisted by two special legislative commissions, appointed, respectively, by Governor Edge in New Jersey and Governor Smith in New York.[11] This Bi-State Legislative Commission, supplementing the work of the Bi-State Port Commission, finally agreed upon the compact in its revised form.

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[10] Annexed to the Progress Report of the Commission for 1919 (Legislative Document 103, New York).

[11] See pages 436, 437, Report of New York, New Jersey Port and Harbor Development Commission.

The complete report of the New York, New Jersey Port and Harbor Development Commission was presented to the Legislatures of both States under date of December 16, 1920. Governor Miller, addressing the Legislature, said in a special message:

> Two matters are thus presented for legislative action of the two States, viz.:
>
> 1. Authorization of a compact for the creation of a Port District and the establishment of a Port Authority with defined powers and duties, and
>
> 2. The approval of the Comprehensive Plan.
>
> Naturally, before approving the plan for so important an undertaking, the legislatures of the two States will carefully consider it. Whilst expert knowledge is required to pass upon many of its features, I do not hesitate to commend the work of the Commission in the highest terms.
>
> However, no narrow or provincial view should be permitted to delay action on the proposed compact. * * *
>
> *The problem is not a local problem. It is not even a joint State problem alone, because its solution will involve and even require the exercise of federal power. It is important for the two States to agree speedily upon a policy of co-operation, and it may be advisable thereupon to secure the approval of Congress, which may become important.*
>
> * * * * * *
>
> *The conclusion is irresistible that there must be a single Port District and a single Port Authority created by the joint action of the two States.*
>
> *As that much is plain, I recommend prompt legislation authorizing the making of a compact in the form recommended by the Commission. That will establish the principle of joint action and lay the foundation for an undertaking of vast moment to all the inhabitants of the two States.*

The Provisions of the Treaty.

This treaty is the first document in which is to be sought any power or duty of the Port Authority relating to the bridge in suit. It must, therefore, be read with some care.

In the recitals, reference is made to the great changes that have come about in the commerce of the port since the Treaty of 1834 between the two States and "the territory in and around the port has become commercially one center or district"; that "a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation," as well as the two States, and that the future development of such facilities would require the expenditure of large sums of money "and the cordial co-operation of the States of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans"; and that such a result can best be accomplished through "the co-operation of the two States by and through a joint or common agency."

Article I contains the solemn pledge of each State to the other of "faithful co-operation in the future planning and development of the port of New York," the States "holding in high trust for the benefit of the nation the special blessings and natural advantages thereof."

Article II creates the "Port of New York District," which, escaping here the terminology of metes and bounds, in the language of the District Court, "runs as far north as Irvington on the Hudson, New York, as far east as Long Beach, Long Island, as far south as Atlantic Highlands and as far west as Summit, New Jersey." (The map of the Port District, containing the Comprehensive Plan, forms a part of the legislation and is on file in the offices

of the Secretaries of State of New York and New Jersey. Copies will be found in the Appendix.)

By Article III there is created "The Port of New York Authority," for brevity referred to throughout as the "Port Authority," which it is provided "shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the Legislature of either State concurred in by the Legislature of the other, or by act or acts of Congress, as hereinafter provided."

Article IV provides for the method of selecting the Commissioners of the Port Authority. They consist of "three resident voters from the State of New York, two of whom shall be resident voters of the City of New York, and three resident voters from the State of New Jersey, two of whom shall be resident voters within the New Jersey portion of the district, * * *."

By Article VI the Port Authority is vested

> "with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it."

But no State or municipal property is to be taken by the Port Authority without the owner's consent, nor does the law impair any State or municipal bonded indebtedness or provisions of law relating thereto.

In the definitions (Art. XXII), *"Transportation facility"* is defined as including railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, car floats, lighters, tugs, floating

elevators, barges, scows or harbor craft of any kind, aircraft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property. *"Terminal facility"* is defined as including wharves, piers, slips, ferries, docks, dry docks, bulkheads, dock walls, basins, car floats, float bridges, grain or other storage elevators, warehouses, cold storage, tracks, yards, sheds, switches, connections, overhead appliances, and every kind of terminal or storage facility now in use or hereafter designed for use for the handling, storage, loading or unloading of freight at steamship, railroad or freight terminals. *"Railroads"* is defined as including railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, sub-stations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment. *"Facility"* is defined as including all works, buildings, structures, appliances and appurtenances necessary and convenient for the proper construction, equipment, maintenance and operation of such facility or facilities or any one or more of them. *"Real property"* is defined as including land under water, as well as uplands, and all property either now commonly or legally defined as real property or which may hereafter be so defined. *"Personal property"* is defined as including choses in action and all other property now commonly or legally defined as personal property or which may hereafter be so defined.

So read, the Port Authority has substantially power to own and operate any conceivable kind of transportation or terminal facility.

The powers granted by Article VI, however, were subject to the following condition:

> "The powers granted in this article shall not be exercised by the port authority until the legislatures of both states shall have approved of a comprehensive plan for the development of the port as hereinafter provided."

Carrying out the recommendations of the Bi-State Commission, Article X provided:

> "The legislatures of the two states, prior to the signing of this agreement, or thereafter as soon as may be practicable, will adopt a plan or plans for the comprehensive development of the port of New York."

By Article VII it is provided that it shall have such additional powers and duties as may be delegated to it from time to time by the action of the Legislature of either State concurred in by the Legislature of the other, but shall not pledge the credit of either State except by and with the authority of the Legislature thereof.

By Article XIII the Port Authority is authorized to

> "petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, after the adoption of the Comprehensive Plan as provided for in Article X for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and

> transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port."

By Article XVIII it is authorized

> "to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either State, and subject to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the Legislatures of both States, shall be binding and effective upon all persons and corporations affected thereby."

By Chapter 151 of the Laws of New Jersey, 1921, and Chapter 154 of the Laws of New York, 1921, commissioners and officials from each State were authorized to execute the agreement or compact for the development of the port in the language now appearing in the port treaty. The treaty was signed on the 30th day of April, 1921.

The commissioners were, by their respective Legislatures, authorized (Sec. 4) "to apply to the Congress of the United States for its consent and approval of the agreement or compact," but it was further provided that "until the same shall have been secured, the said agreement or compact shall be binding upon the State * * * in all respects permitted by law for the two States of New York and New Jersey without the consent of Congress to cooperate, for the purposes enumerated in said agreement or compact, and in the manner provided therein."

The Congressional Resolution of 1921.

The commissioners did apply to the Congress of the United States, and by Public Resolution No. 17, 67th Congress, S. J. Res. 88 (Appendix, p. 67 *et seq.*), Congress gave its consent "*to the said agreement, and to each and*

every part and article thereof," with the reservation that "nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement" and "That the right to alter, amend or repeal this resolution is hereby expressly reserved." The resolution of Congress was approved by the President on the 23rd of August, 1921.

The Secretary of War, in advising Congress to pass the resolution, said:

> "The adequate improvement and development of port facilities at New York is a deserving enterprise, and if the work is accomplished on the comprehensive plan of co-operation contemplated by the two States it will doubtless result in benefit to the transportation interests of the entire Nation. I recommend, therefore, that Congress give its consent to the agreement."

The report of the Committee on the Judiciary of the House, in recommending the passing of the resolution, said:[12]

> "Recommendations Nos. 2, 3 and 4 make up the comprehensive physical plan, the improved railroad terminal system which will be the backbone of a rational port development, and the formal adoption of which, in conjunction with the compact, the commission urges upon the legislatures. The economic sequence of construction should be determined by the Port Authority."
>
> "Historically, geographically, and commercially, New York and the industrial districts in the northern part of New Jersey constitute a single unit, a great metropolitan district of more than 8,000,000

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[12] Report submitted by Mr. Goodykoontz, from the Committee on the Judiciary, to accompany H. J. Res. 172—67th Congress, 1st Session, Report No. 279.

people. The port of New York, with its three entrances, 800 miles of water front, 12 railroads (exclusive of local transit lines) entering the port, a terminus for nearly all of the more important transatlantic lines, not only concerns the people of the two States, but constitutes an asset of the entire Nation. The necessity of creating the port district and authorizing the creation of the port authority is manifest from the fact that over 40 municipalities are involved, some of them controlled by men of divergent views and many of them working at cross-purposes and in the dark."

THE SUIT TO RESTRAIN THE SIGNING OF THE TREATY.

The City of New York brought suit in the Supreme Court of New York State for New York County to enjoin and restrain Commissioners Willcox, Outerbridge *et al.* from entering into the port treaty, but its application for an injunction was denied (*City of New York* v. *Willcox*, 115 Misc. 351).

STUDY PRECEDING THE COMPREHENSIVE PLAN.

The second source in which must be sought any power or duty of the Port Authority in the premises is the Comprehensive Plan adopted by the two States and by Congress to guide specifically the reorganization of the port district. The statute embodying the plan may be divided in three parts: Section 1, containing the general principles, in which, if in any part of the plan, is to be found the power and duty to deal with the bridge in question; Sections 2 to 5, dealing with specific changes, and the remaining sections dealing with general power and authority.

The term "Comprehensive Plan" was coined by the New York, New Jersey Port and Harbor Development Commis-

sion for the purpose of describing the "layout" or arrangement of railroad, water and highway facilities by which all parties interested—carriers, state agencies, municipalities, steamships, industrial bodies—could be governed and guided in the carrying forward of their respective plans. It was necessary that the plan should be sufficiently definite and certain to be reliable, and yet sufficiently flexible not to preclude its modification in the direction of improvement. The states were unwilling, as is shown by the reservation in Article VI, to vest broad powers in the Port Authority until such a Comprehensive Plan had been approved. The communities attended before committees of the legislatures of the respective states and argued that unless the plan took care of their respective needs it might destroy one community, though benefiting another. The Comprehensive Plan, therefore, was to be the backbone of the future development of the Port of New York.

It will be observed that when the Bi-State Commission made its compendious report in 1920, the Legislatures declined, as they had done in 1919, to adopt the comprehensive or physical plan without further study. By July 30, 1921, therefore, there existed the pledge of the two States to co-operate, an agency competent to co-operate as the "joint or common agency" of the two States, the district within which this co-operation was to be effective, and the pledge of the two States to agree upon a Comprehensive Plan. The legislative direction was that the commissioners of the Port Authority should "take up, study and consider the joint report of the New York-New Jersey Port and Harbor Development Commission." The legislation directed that the commissioners of the Port Authority should "hold public hearings thereon," "confer with the governing bodies of all of the municipalities within the port district and all dock, port, channel and improvement commissions, and any other bodies hav-

ing to do with port and harbor facilities, with the Secretary of War, with the appropriate committees of Congress, with the Interstate Commerce Commission, and any and all other Federal authorities having jurisdiction in the premises, and shall, for the purpose of securing advice and information, create an advisory council of representatives of chambers of commerce, boards of trade and other civic bodies within the port district whose charters include consideration of the matters embraced in the said joint report." The commissioners were further required to confer with railroad, steamship, warehouse and other officials. Based upon all of this further study, the commissioners were required to report to the Legislatures of both states prior to January 1, 1922, the results of their "study, investigation, hearings and conferences," and to submit a "Comprehensive Plan for the Development of the Port District," the result of such study, investigation, hearings and conferences, "together with their recommendations for such legislation as they deem appropriate for the effectuation and consummation of such plan."

During the year of 1921-2, after the authorization of the treaty and the creation of the Port Authority, the latter body proceeded to carry out the mandate of the two Legislatures. It made its report to the two Legislatures under date of December 21, 1921. This report shows that not only had the compact been executed, ratified and approved by Congress, but that the Advisory Council of trade and civic societies had been created, that the railway carriers, the shipping interests and all other parties interested had been consulted; and upon all of these the Port Authority recommended a "Comprehensive Plan." In its report (p. 11) the Port Authority said:

> It already is clear that certain fundamental conditions precedent can alone provide a proper solu-

tion of the problem and that any physical plans should comply with and be governed by those principles, so far as economically practicable.

These principles were later adopted *in haec verba* in the law as Section 1.

In explanation of these principles the Port Authority said "that only by a well-devised and comprehensive plan can such a great expanse of natural advantages be properly developed and co-ordinated so that all portions may have their free opportunity, and also that only by such means can there be avoided the mistakes of the past and be prevented the creation of new points of congestion that would occur again in the future by leaving the various districts unrelated."

It found that the plan must be one that would not alone assure prompt relief, but one that would "project larger plans for future development as far ahead as the process of reasoning could foresee, so that each part of the port in the development of its local projects and its growth might properly co-ordinate them with the whole."

Attached to its report, and indicating how the various local improvements would dovetail and fit in with the larger Comprehensive Plan, is an exhibit showing the "Port Newark Terminal showing Proposed Development Bureau of Docks," as well as improvements projected by other municipalities within the district.

The Comprehensive Plan.

The statutes embodying the plan are Chapter 43 of the Laws of New York, 1922, and Chapter 9 of the Laws of New Jersey, 1922. These will be found at page 69 *et seq.* of the Appendix and are in identical language in each State.

Each Act provides:

> "Now, therefore (the State of New York [or the State of New Jersey, as the case may be] by appropriate legislation concurring therein), the following be and it is hereby adopted as the Comprehensive Plan for the development of the Port of New York, under and pursuant to said compact or agreement."

The plan then follows.

Section 1 deals with the principles to govern the development. Because of the fact that they are the only general directions found in the plan as to the reorganization of the district, we quote them at length:

> First: That terminal operations within the Port District so far as practicable should be unified;
>
> Second: That there should be consolidation of shipments at proper classification points so as to eliminate duplication of effort, inefficient loading of equipment and realize reduction in expenses;
>
> Third: That there should be the most direct routing of all commodities so as to avoid centers of congestion, conflicting currents and long truck-hauls;
>
> Fourth: That terminal stations established under the Comprehensive Plan should be union stations so far as practicable;
>
> Fifth: That the process of co-ordinating facilities should so far as practicable adapt existing facilities as integral parts of the new system so as to avoid needless destruction of existing capital investment and reduce so far as may be possible the requirements for new capital; and endeavor should be made to obtain the consent of the States and local municipalities within the Port District for the co-ordination of their present and contemplated port and terminal facilities with the whole plan;

Sixth: That freight from all railroads must be brought to all parts of the port wherever practicable without cars breaking bulk, and this necessitates tunnel connection between New Jersey and Long Island, and tunnel or bridge connections between other parts of the port;

Seventh: That there should be urged upon the Federal authorities improvement of channels so as to give access for that type of waterborne commerce adapted to the various forms of development which the respective shorefronts and adjacent lands of the port would best lend themselves to;

Eighth: Highways for motor truck traffic should be laid out so as to permit the most efficient interrelation between terminals, piers and industrial establishments not equipped with railroad sidings and for the distribution of building materials and many other commodities which must be handled by trucks; these highways to connect with existing or projected bridges, tunnels and ferries;

Ninth: Definite methods for prompt relief must be devised that can be applied for the better co-ordination and operation of existing facilities while larger and more comprehensive plans for future development are being carried out.

Section 2 declares merely that the bridges, tunnels and belt lines forming part of the Comprehensive Plan "are generally and in outline indicated on maps filed by the Port of New York Authority in the offices of the secretaries of the States of New York and New Jersey." Copies of the map are submitted as part of this case.[13]

Section 3 names the tunnels and bridges which are to form part of the plan. (a) A tunnel or tunnels connecting the New Jersey shore and the Brooklyn shore. (b) A

[13] Inside back cover.

bridge and/or tunnel across the Arthur Kill. By subdivision (c) it is provided that "the location of all such tunnels or bridges to be at the shortest, most accessible and most economical points practicable, taking account of existing facilities now located within the port district and providing for and taking account of all reasonably foreseeable future growth in all parts of the district."

Section 4 deals with the connection of the Island of Manhattan with New Jersey by bridge or tunnel, or both.

Section 5 deals with fifteen belt lines, naming in each instance the existing railroad facilities which are to form a part thereof.

Section 6 provides as follows:

> "The determination of the exact location, system and character of each of the said tunnels, bridges, belt lines, approaches, classification yards, warehouses, terminals or other improvements shall be made by the Port Authority after public hearings and further study, but in general the location thereof shall be as indicated upon said map, and as herein described."

Section 7 contains the reservation that:

> "The right to add to, modify or change any part of the foregoing Comprehensive Plan is reserved by each State, with the concurrence of the other."

The adoption by the two Legislatures of the Comprehensive Plan fulfilled the condition contained in Article VI of the port treaty and thus made available the powers vested in the Port Authority by the treaty itself. From that moment the Port Authority could exercise any of the powers vested in it under the treaty. In order to make

more effective, however, the pledge which the two States had agreed upon, the legislative acts approving of the Comprehensive Plan added powers to the Port Authority. Section 8 provides:

> "The Port of New York Authority is hereby authorized and directed to proceed with the development of the Port of New York in accordance with said Comprehensive Plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either State to effectuate the same, except the power to levy taxes or assessments."

The Legislatures further said:

> "The Port Authority shall be regarded as the municipal corporate instrumentality of the two States for the purpose of developing the port and effectuating the pledge of the States in the said compact."

The treaty provided that it was the intention of the States to create "a joint or common agency." It was now defined as "the municipal corporate instrumentality of the two States." It was expressly provided that "it shall have no power to pledge the credit of either State or to impose any obligation upon either State, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given."

But to enable it to borrow the large sums of money which would be required, the States agreed—and their compact is a contract within the meaning of the Constitution (*Green* v. *Biddle*, 8 Wheat. 1, 5 L. Ed. 547)—that the bonds *or securities* issued by the Port Authority *shall at all times be free from taxation by either State.* The

States further provided that "all municipalities within the district are hereby authorized and empowered to co-operate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to co-operate." The Port Authority itself was to "render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan." It has "power to apply to all Federal agencies, including the Interstate Commerce Commission, the War Department and the United States Shipping Board, for suitable assistance in carrying out said plan." It was required to "co-operate with the State Highway Commissioners of each State so that trunk line highways as and when laid out by each State shall fit in with said Comprehensive Plan."

It was not only to "request the Congress of the United States to make * * * appropriations for deepening and widening channels," but to request the Congress "to make such grants of power as will enable the said plan to be effectuated." It did apply to the Congress, both for the appropriations for deepening and widening channels and for grant of power.

The Federal Approval and Grant of Power.

The grant of power is to be found in the resolution of Congress (Appendix, p. 81, Public Resolution No. 66, 67th Congress—H. J. Res. 337) granting both the "consent of Congress" and "authority to the Port of New York Authority to execute the Comprehensive Plan approved by the States of New York and New Jersey by Chapter 43, Laws of New York, 1922, and Chapter 9, Laws of New Jersey, 1922." The resolution recited that, pursuant to the agreement or compact entered into in 1921 the two

States had agreed upon a Comprehensive Plan for the development of the port, and that "the carrying out and executing of the said plan *will the better promote and facilitate commerce between the States, and between the States and foreign nations, and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation.*"

The details of the legislation are repeated *in haec verba.*

> "AND THE CONSENT OF CONGRESS IS HEREBY GIVEN TO THE CARRYING OUT AND EFFECTUATION OF SAID COMPREHENSIVE PLAN, AND THE SAID PORT OF NEW YORK AUTHORITY IS AUTHORIZED AND EMPOWERED TO CARRY OUT AND EFFECTUATE THE SAME."

The only reservations in the resolution are the following:

That the powers are

> "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution."

> "That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

> "That no bridges, tunnels, or other structures shall be built across, under, or in any of the waters of the United States, and no change shall be made in the navigable capacity or condition of any such waters until the plans therefor have been approved by the Chief of Engineers and Secretary of War."

> "That the right to alter, amend, or repeal this resolution is hereby expressly reserved."

In the Progress Report of the Port Authority for 1923 to the Legislatures of the two States, in reporting the approval by Congress, it refers to the report of the Committee of the Judiciary in support thereof and states:

> "President Harding recognized the great importance of the matter, and though it reached him only on Saturday, July 1, 1922, when he was under great pressure of many important matters and bound by engagements to leave Washington for a visit to Gettysburg, nevertheless he gave it his immediate consideration and approved it that day."

In the same report the effect of the adoption of the Comprehensive Plan on Federal appropriations for harbor development within the Port District is reported in the following paragraph:

> "The effect of the adoption of the Comprehensive Plan upon the matter of deepening and widening channels and improving harbors is to be found in the recent report of the Chief of Engineers of the War Department and the proposed Rivers and Harbors Act. (Annexed hereto is a table showing appropriations in previous years and the appropriations proposed for this year.)[14] Congress, in the opinion of the Army Engineers, is justified in making appropriations now that there is a plan upon which to proceed.

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[14] This table showed that Congress proposed appropriations of $7,937,000 for improvements in the port district for the year 1923, the first following the adoption of the Comprehensive Plan. This compared with a maximum during eight of the preceding nine years of less than $3,000,000, the exception being the year 1919 when $7,718,600 was appropriated, $6,500,000 being devoted to a single project in the East River. Contrasted to this the proposed appropriations for 1923 were spread over twenty-five localities, a distribution not before approached during the ten-year period.

> "The recommendations of the Chief of Engineers of the amounts that should properly be expended in the next year for river and harbor improvement and maintenance totaled $56,090,410.
>
> "The amounts included in this for the Port of New York District totaled $7,937,000."

Thus Congress not only expressly ratified, but acted in reliance upon, the effectuation of the Comprehensive Plan by making appropriations for the water channels over which the Federal Government has jurisdiction, assuming that the powers vested in the Port Authority and in the municipal bodies to co-operate would, in due course, bring about the consummation of all the other portions of the Comprehensive Plan. *Congress, in authorizing the Comprehensive Plan, adopted the principles of the Plan and the belt lines as regulations of commerce and navigation binding upon the carriers, as well as all others.*

Subsequent Legislation.

Other statutes relating to the Port Authority have been adopted, notably Chapter 623, Laws of New York, 1924, printed in the appendix. It was felt that the powers vested in the Port Authority to hold hearings were insufficient for the accomplishment of the objects charged to its care in the Comprehensive Plan, and accordingly the State of New York further defined the powers already granted to it and provided adequate machinery and appropriate jurisdiction in the Supreme Court of the State for the effectuation of those powers. This act provides for the holding of hearings, defines the Port Authority's jurisdiction, provides for the power of subpoena, the making and execution of orders, and gives jurisdiction to the Supreme Court effectively to support the jurisdiction of the Port Authority.

There were also adopted by the legislatures of the two States in 1924 statutes in identical form, reference to which is made in the appendix, conferring upon the Port Authority the power to construct and operate bridges across the Arthur Kill, between Staten Island and New Jersey. The Port Authority may pay for the bridges out of its own bond issues and support the bridges and retire the bond issues out of tolls. It is given the power of condemnation and such supplementary powers as it needs. These acts seem to have no bearing on the present case and are therefore not given in detail.

Subsequent and Pending Proceedings.

Up to the present time the Port Authority has confined the exercise of the powers conferred upon it to further study of the various problems committed to its charge and to the accomplishment of steps in its plan and other services to the public within the district, through hearings held either by itself or concurrently with the Interstate Commerce Commission or by its representation of the port district before other public bodies.

Specifically, the first proceeding instituted by the Port Authority was a hearing held concurrently by the Port Authority and the Interstate Commerce Commission on their own motion to determine what steps should be taken in the establishment of Belt Line No. 13, as described in Section 5 of the Comprehensive Plan. During the course of the hearings a remedy was proposed by the carriers interested and their proposal was accepted for trial and the hearings suspended. Pursuant to the proposal, the carriers have invested some hundreds of thousands of dollars in the creation of new and the reorganization of old facilities, have reconstructed their rate system along Belt Line No. 13, and have instituted other reforms to carry out the

direction of the statute. A hearing conducted by the Port Authority alone on the use of the Hell Gate bridge owned by the New York Connecting Railroad and forming a part of Belt Line No. 1, described in Section 5 of the Comprehensive Plan, is still pending.

In addition to this the Port Authority has intervened in several other important proceedings before the Interstate Commerce Commission, some of which are still pending, and in the proceeding before the United States Shipping Board relating to the subject of ocean differentials.

It is unnecessary to describe in detail the studies in which the Port Authority is engaged, such as those relating to inland union terminals, consolidation of lighterage, and so on.

I.

There can be no doubt of the power of Congress to deal with the subject-matter of the Comprehensive Plan nor of the effect of its action when it has so dealt.

The power of Congress to legislate effectively as to every part of and every instrumentality used in interstate commerce and the paramount effect of its legislation are too well settled to require discussion. We content ourselves with the citation of authorities:

Houston E. & W. T. R. Co. v. *United States*, 234 U. S. 342; 58 L. Ed. 1341 at p. 1347.

Minnesota Rate Cases, 230 U. S. 352, at p. 399 (*Simpson* v. *Shepard*).

Northern Securities Co. v. *United States*, 193 U. S. 197, at p. 333.

Smith v. *Alabama,* 124 U. S. 465, 31 L. Ed. 508, at p. 510.

Addyston Pipe & Steel Co. v. *United States,* 175 U. S. 211, 44 L. Ed. 136, at p. 143.

In re Debs, 158 U. S. 564, 582.

California v. *Central Pacific R. Co.,* 127 U. S. 1, 32 L. Ed. 150, at p. 157.

Swift & Co. v. *United States,* 196 U. S. 375, 49 L. Ed. 518, at p. 525.

Luxton v. *North River Bridge Co.,* 153 U. S. 525, 38 L. Ed. 808, at p. 810.

Paul v. *Virginia,* 8 Wall. 168, 19 L. Ed. 357, at p. 361.

The Clinton Bridge, 1 Woolworth 150, October Term, 1867, Mr. Justice Miller, at p. 159.

II.

There can be no doubt of the right of Congress to make the Port Authority its agent to carry out its legislation.

While we do not suppose that the power of Congress to legislate on any phase of interstate commerce, to the exclusion of the States, can longer be questioned, the issue here presented, as we understand it, is what the intention of Congress was in the legislation which it did adopt; and, so far as the Port Authority is concerned, did the adoption of the Comprehensive Plan supersede the acts permitting the Central Railroad of New Jersey to construct the bridge in question?

Now, it is not to be doubted that Congress could select the Port Authority as its agent to do any act in relation to interstate commerce or its instrumentalities within the Port District which it chose.

Luxton v. *North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808, at p. 810:

> "The Congress of the United States, being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end."

For which are cited:

McCulloch v. *Maryland*, 17 U. S. 4 Wheat. 316, 411, 422.

Osborn v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 861, 873.

Union Pac. R. Co. v. *Myers* ("Pacific R. Removal cases"), 115 U. S. 1, 18.

California v. *Central Pac. R. Co.*, 127 U. S. 1, 39.

Stockton v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, at pp. 14, 15:

> "At all events, if Congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the State, or out of the State, we see no reason why it should not do so. There is nothing in the Constitution to prevent it from making contracts with or conferring powers upon State corporations for carrying out its own legitimate purposes."

III.

There can be no doubt that Congress has made the Port Authority its agent for the effectuation of the Comprehensive Plan.

(a) Words of power or authority in a statute must be construed as imperative and mandatory where such power or authority includes the performance of an act as to which the public is interested, or where the statute directs the doing of a thing for the sake of the public good.

The Circuit Court of Appeals (4th Cir.) in *State of Maryland* v. *Miller*, 194 Fed. 775, in approving a Maryland case, *Baltimore* v. *Marriott*, 9 Md. 160, said, at page 781:

> "There the provision was to the effect that the City of Baltimore should have 'full power and authority' to pass all laws and ordinances necessary to preserve the health of the city, and to prevent and remove nuisances, etc., and the Court held that when the statute conferred power upon the corporation, to be exercised for the public good, the exercise of the power was not merely discretionary, but imperative, and that the words 'power' and 'authority' meant duty and obligation."

The statute under consideration in that case gave to the Mayor and the Council of Baltimore "full power and authority" to provide for the preservation and navigation of certain rivers.

Under an Act of Congress of May 11, 1912, the Secretary of the Interior is "authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct" certain unallotted Government lands. The Circuit Court of Appeals (8th Cir.) in *Chase* v. *United States*,

261 Fed. 833, where the construction of this Act of Congress was considered, held that a statute which "authorized" a public officer to do a certain thing imposes upon him a positive and absolute duty to do such act, which may be enforced by those for whose benefit it is to be done, in the absence of words giving him discretion. At page 837 of the opinion it is said:

> "An examination of the legislation of Congress shows that in many of the Acts of Congress the word 'authorized' is frequently used where a duty is imposed upon a public executive officer, and in no case are the duties imposed discretionary unless, after the word 'authorized' the other words, 'in his discretion,' are added. As was said by the Supreme Court of the United States in *Mason et al.* v. *Fearson,* 9 How. 258, 13 L. Ed. 125:
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> "'Whenever it is provided that a corporation or officer "may" act in a certain way, or it "shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer and relates to the public or third persons. * * * Without going into more details, these cases fully sustain the doctrine that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the Legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty."' *Mayor of New York* v. *Furze,* 3 Hill (N. Y.) 612; *Minor et al.* v. *Mechanics' Bank of Alexandria,* 1 Pet. 46, 64, 7 L. Ed. 47, and note; *Livingston* v. *Tanner,* 14 N. Y. 64; *Ralston* v. *Crittenden* (C. C.), 13 Fed. 508; *Supervisors Rock Island County* v. *U. S.,* 4 Wall. 435, 18 L. Ed. 419."

In *Jones* v. *Madison County Commissioners,* 137 N. C. 579, 50 S. E. 291, it was said:

> "The terms of the first section of the act conferring power to issue bonds are 'authorize and empower' and in ordinary acceptation and in private transactions are usually permissive; but when these words are used in statutes they are frequently imperative, and where the statute is concerning public interests, or promotive of justice, or to secure and maintain the individual rights of others, such words are well-nigh uniformly construed to be mandatory. * * * Mr. Black in his Interpretation of Laws, p. 541, formulates the rule thus: 'Where a statute provides for the doing of some act which is required by justice or public duty, as where it invests a public body, municipality or officer, with power and authority to take some action which concerns the public interests or the rights of individuals, though the language of the statute be merely permissive in form, yet it will be construed as mandatory, and the execution of the power may be insisted upon as a duty.' * * *
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> "He then cites several cases in which the term 'may' and 'authorized and empowered' and 'authorized' are respectively held to be imperative, and then proceeds: 'Even where the act provides that certain public officers, if deemed advisable, or if they believe the public good and the best interests of the city require it, may levy a certain tax, though these words are purely permissive in form, yet the act will be held to be peremptory whenever the public interests or individual rights call for the exercise of the power granted. And, in general, where the statute enacts that a public officer "may" act in a certain way, which is for the benefit of third persons, he *must* act in that way.'"

See, also:

Brokaw v. *Commissioners of Highways,* 130 Ill. 482, at p. 491.

People v. *Board of Supervisors,* 51 N. Y. 401, at pp. 405, 406.

Newburg Turnpike Co. v. *Miller,* 5 Johns. Ch. 101, at p. 113.

The statute considered in *Mayor, etc., of New York* v. *Furze,* 3 Hill 612, merely provided that "it shall be lawful" for certain specified officers to cause the construction of sewers. In approving and following the English authorities upon the subject the Court said, at pages 614-615:

> "This statute is one of public concern, relating exclusively to the public welfare; *and though permissive merely in its terms, it must be regarded, upon well-settled rules of construction, as imperative and peremptory upon the corporation.* When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it. The exercise of the power becomes then a duty which the corporations are bound to fulfill." [The Court then discusses certain old English cases.]
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> "The inference deducible from the various cases on this subject seems to be that where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely and not peremptory."

The decisions of the United States Supreme Court are to the same effect. The statute involved in *Supervisors* v. *United States,* 4 Wall. 435, provided: "The board of supervisors * * * in such counties as may be owing debts

which their current revenue * * * is not sufficient to pay *may, if deemed advisable,* levy a special tax * * *" Mr. Justice Swayne, speaking for the Court, said, at pages 446, 447:

> *"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory.* What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.
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> In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"

Even the fact that a body has no power to enforce its orders cannot be successfully urged as a denial of the power to make the order. See *Turner Creamery Co.* v. *Chicago, M. & St. P. Ry. Co.,* 154 N. W. 819. See also *United States ex rel. Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 252 U. S. 178, where this Court directed the issuance of a writ of mandamus to compel the Interstate Commerce Commission to perform its duties under the provisions of the Valuation Act of March 1, 1913, though this would necessarily open a wide range of proof and call for "the exercise of close scrutiny and of scrupulous analysis in its consideration and application." In that case the Interstate Commerce Commission declined to receive and act upon evidence offered, upon the ground that it was impossible and difficult to accomplish the results intended by the statute.

(b) An appropriation to effectuate a work indicates an intent to have that work proceed.

In *Wisconsin* v. *Duluth,* 96 U. S. 379, the effect of an appropriation of ten thousand dollars to improve, protect and secure a canal was considered by the United States Supreme Court.

The canal improvement was laid out by Duluth and subsequently Congress appropriated $10,000 to improve, protect and secure the canal. *This action of Congress, i. e., making an appropriation, was held by the United States Supreme Court sufficient to indicate that Congress had taken charge of the situation,* and not even the United States Supreme Court could interfere.

> "We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these Acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking exclusive charge and control of it; that they amount to the declaration of the Federal Government, that we here interpose and assert our power; we take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.
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> "If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this Court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this Court decree that it must forever pursue the old channel, by the

natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"WHEN CONGRESS APPROPRIATES $10,000 TO IMPROVE, PROTECT AND SECURE THIS CANAL, THIS COURT CAN HAVE NO POWER TO REQUIRE IT TO BE FILLED UP AND OBSTRUCTED."

(c) In determining the meaning of the words employed, the intent of Congress is to be gathered from a consideration of the entire act and not solely from detached portions thereof. An act will never be held to destroy itself, but carries with it all power necessary to attain the end implied.

"* * * the general purpose of the act and the evils sought to be remedied must be always kept in mind, and, furthermore, parts of the act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose." (Opinion of District Judge Shiras in *Van Patten* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 81 Fed. 545, at p. 547.)

"Whenever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied. It is a well-established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant." (Lewis' Sutherland Statutory Construction, 2nd Ed. [1904], pp. 942, 943, 1 Kent Com. 464.)

"Where a statute creates a right, and provides generally for its enforcement, but neither creates nor designates a remedy, *the implication is that the Legislature intended that the right should be enforced by some existing and appropriate remedy."* (*Van Sickle* v. *Belknap,* 129 Indiana 558.)

Again:

> *"When a statute creates a new obligation, or makes unlawful that which was lawful before, a corresponding right is thereby impliedly given, either to the public or to the individual injured by the breach of the enactment; and sometimes to both."* (Endlich on the Interpretation of Statutes, Sec. 463, under "Statute Implies Means of Enforcement.")

In *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company,* 204 U. S. 426, 442, Chief Justice White held that every provision of the Interstate Commerce Act must be "read in connection with the context of the act" and that if "the general terms of the section, when taken alone, might sanction" a conclusion destructive of certain rights conferred in other parts of the act, the context must be considered and the general terms be so construed as to give full effect to the entire act.

IV.

The issues involved here.

The sole question involved in this case, so far as the Port Authority is concerned, is whether or not the general powers and duties granted to the Port Authority by the compact between the two States and by the Comprehensive Plan, all approved and adopted by Congress, apply to transportation facilities in the port district even when such facilities are not specifically mentioned. If the bridge in question had been specifically designated, as were the other two bridges crossing Newark Bay, there would be no question in our mind that the action of Congress in approving the Comprehensive Plan had, so far as inconsistent therewith, superseded the earlier statutes author-

izing the Central Railroad of New Jersey to rebuild the bridge. Not being so specified, the simple question remains, whether the general grants of power and duties laid upon the Port Authority by the compact and the plan did assure a reorganization of the port in harmony with the requirements of efficiency and economy, and particularly that the principles enumerated in Section 1 of the plan indicate an intention on the part of Congress and the States to make the approval of the Port Authority a condition precedent to changes in transportation facilities or to give the Port Authority a veto power over such changes if it shall believe them harmful.

The police powers of the State to regulate facilities of commerce and navigation and the constitutional power of Congress to control them, *all are now concentrated toward the accomplishment of a single plan by a single agency.*

There can be scarcely any doubt that Congress and the States intended that the Port Authority should be the guardian of the port, that it should safeguard the interests of all of the municipalities and of all the people residing in the port in so far as the improvement of their facilities and freight transportation were concerned. There can be no question that the Port Authority is the joint and common agency of the two States, for the purpose not alone of effectuating the Comprehensive Plan approved by the two States, but also of all supplementary plans thereto. It is significant that the Governors of the two States have recommended that the Port Authority undertake the financing and building of additional vehicular tunnels and bridges between the two States, and that the Legislatures have charged it with the construction of two bridges. Doubtless, in the years to come if this great agency justifies the hopes and expectations of the Legislatures and Congress and of the municipalities that have supported the project more and more will it come to be recognized as the

expert body competent to pass upon all matters relating to transportation service within the Port District. Its advice is sought by the engineers for the municipalities within the district and by the Federal agencies having to deal with transportation and shipping problems.

But as the District Court found that the commissioners of the Port Authority chance to be conservative men, not grasping for power, not interpreting the grants of power to extend their scope, but feeling rather modest in the assertion of their powers, it comes about that in this situation the Port Authority takes no position for or against the construction put upon the legislation by the City of Newark or the Central Railroad of New Jersey. Counsel for the Port Authority offers the foregoing historical recital and summary of the statutes as aids to the Court, and submits the following analysis of what seem to him to be the basic differences in principle:

Is the Comprehensive Plan limited to the bridges, tunnels and belt lines specifically named therein, or is its scope to be found in the nine principles stated in Section 1?

If the principles in Section 1 are to be applied, are they to be applied so as to embrace all terminal facilities within the Port District, whether specifically referred to in the legislation or not?

Are they to be so applied before the time when the Port Authority shall decide of its own initiative to take action thereon?

Is the question whether or not the proposed changes in the bridge come within the Comprehensive Plan a question of law or a question of fact?

Is the Port Authority the agency for determining such a question of fact, if it be a question of fact?

It seems to us that these questions can only be answered in the light of the general purpose of the legislation and with the objective of ultimately effectuating the entire plan.

Conclusion.

For these reasons we have deemed it to be our duty, even at considerable length, to lay before the Court the history and the legislative documents properly interpretative of the legislation here under review, and to do so in the spirit of a real *amicus curiae*. We are authorized to say again that if the Court should find that it is the Port Authority's duty to consider whether or not the remodeling of this bridge is or is not in conflict with the effectuation of the Comprehensive Plan it will gladly perform that duty.

Dated, New York, November 7, 1924.

Respectfully submitted,

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